INTRODUCTION TO AMERICAN GOVERNMENT

THE CENTURY
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INTRODUCTION TO AMERICAN GOVERNMENT

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NEW YORK
THE CENTURY CO.
1922

Printed in U. S. A.

PREFACE

This book is intended to supply, within reasonable compass, an account of the national, state, and local governments of the United States. The needs of the serious-minded general reader have not been ignored. But the person for whom the volume is primarily designed is the college student who finds himself enrolled in a general course in American government and politics in perhaps his sophomore year. It is with him in mind that three features, in particular, have been incorporated. The first is the innovation comprised in Part I. The college student is sufficiently mature to be brought into profitable contact with the more important elements, principles, and problems of political science in general—matters which relatively few ever study in separate courses. Experience shows that such contact stretches the mind and widens the horizon, to the student's great advantage when he comes to contemplate the American, or any other particular, governmental system. Definitions are established, concepts are worked out, background and perspective are gained, which result in both a saving of time and an enrichment of knowledge and interpretation. Nevertheless, the contents of this volume are so arranged that, at the instructor's discretion, Part I can be omitted altogether, or used only for occasional reference.

The second feature that has been deliberately stressed is criticism of existing political institutions and practices. If defects and failures seem sometimes to have been dwelt upon unduly, it has been only with a view to developing in the student an inquiring, discriminating, critical attitude, and directing his thought along forward-looking and constructive lines. A third feature, closely related, is the attempt to emphasize principles, rather than structural and procedural details. The student of American government must become master of a large body of facts. But he ought not to stop there. Facts readily slip from the mind. Besides, they are subject to ceaseless change. Principles, points of view, tendencies, influences and counter-influences, the reaction of human nature to political tasks and situations—these are the things with

which instruction in government must mainly deal if it is to be dynamic and socially useful.

Without pretending to supply exhaustive bibliographies, we have sought to guide both teachers and students to the best and most available books, magazine articles, and documents on the various topics taken up.

For personal assistance of various kinds, we are indebted to Dr. Walter Thompson and Messrs. Waldo Schumacher, R. L. Mott, R. A. Jargo, and J. T. Law, of the University of Wisconsin, and to Professor Kenneth Colegrove, of Northwestern University.

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April 4, 1922.

CONTENTS

PART I

THE NATURE AND PROBLEMS OF GOVERNMENT

CHAPTER		PAGE
I	INTRODUCTION: THE STUDY OF GOVERNMENT	3
II	THE NATURE AND ORIGINS OF THE STATE	8
III	STATE FUNCTIONS AND RELATIONS	23
IV	THE BASIS AND KINDS OF GOVERNMENT	35
V	THE DISTRIBUTION OF GOVERNMENTAL POWERS	51
VI	THE STRUCTURE OF GOVERNMENT	60
VII	THE POSITION OF THE INDIVIDUAL	73

PART II

THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

VIII	COLONIAL BEGINNINGS	83
IX	THE REVOLUTION AND THE GROWTH OF POLITICAL IDEAS	99
X	THE ARTICLES OF CONFEDERATION	116
XI	THE MAKING OF THE CONSTITUTION	129
XII	THE NEW FEDERAL SYSTEM	144
XIII	THE STATES	159
XIV	THE CITIZEN AND HIS RIGHTS	180
XV	PRIVILEGES OF CITIZENSHIP: THE SUFFRAGE	197
XVI	CONSTITUTIONAL DEVELOPMENT	209

PART III

THE NATIONAL GOVERNMENT

XVII	THE PRESIDENCY	225
XVIII	NOMINATION AND ELECTION OF THE PRESIDENT	232
XIX	THE PRESIDENT AS CHIEF EXECUTIVE	254
XX	THE PRESIDENT AND CONGRESS	274
XXI	THE CABINET AND THE EXECUTIVE CIVIL SERVICE	290
XXII	THE DEPARTMENTS AND THEIR WORK	312
XXIII	THE STRUCTURE OF CONGRESS	334
XXIV	CONGRESSIONAL ORGANIZATION	356
XXV	CONGRESS AT WORK	378
XXVI	THE POWERS OF CONGRESS: GENERAL VIEW	395
XXVII	NATIONAL FINANCE	405
XXVIII	THE REGULATION OF COMMERCE	434
XXIX	MISCELLANEOUS POWERS OF CONGRESS—WAR POWERS	458

CHAPTER		PAGE
XXX	The Government of the Territories	471
XXXI	The National Judiciary	491
XXXII	Political Parties and National Politics	516

PART IV

STATE GOVERNMENT

XXXIII	Importance and Common Features of the States	545
XXXIV	State Constitutions	555
XXXV	The Legislature: Structure and Composition	573
XXXVI	The Legislature: Powers and Limitations	589
XXXVII	The Legislature at Work	608
XXXVIII	The State Executive	624
XXXIX	State Administration	639
XL	State Finance	654
XLI	The State Judiciary	671
XLII	The Party System in the States	688

PART V

LOCAL GOVERNMENT AND ADMINISTRATION

XLIII	The County and Its Government	715
XLIV	Criticism and Reconstruction of County Government	732
XLV	The City and Its Charter	743
XLVI	The Mayor-Council Type of City Government	755
XLVII	Commission and Manager Government	765
XLVIII	Protective Activities of the City	777
XLIX	Other Municipal Activities—City Finance	788
L	Townships, Villages, and Special Districts	800
	Appendix. The Constitution of the United States	811
	Index	831

INTRODUCTION TO AMERICAN GOVERNMENT

INTRODUCTION TO AMERICAN GOVERNMENT

PART I

THE NATURE AND PROBLEMS OF GOVERNMENT

CHAPTER I

INTRODUCTION: THE STUDY OF GOVERNMENT

The purpose of this book

This volume is designed for use in introductory courses in political science in American colleges and universities. The authors, therefore, feel safe in assuming that most persons who take it up will already have an elementary knowledge of many matters with which it deals. Such readers will have learned in some degree from their study of American history and civics, or from observation, how our national constitution was framed and adopted, upon what principles it is based, what we mean by the doctrine of separation of powers, how the president is elected, how the houses of Congress are composed and what are some of the things that they can do, what the courts are for, how a bill is passed in a state legislature, who collects the state taxes, what the duties of the sheriff are, what commission government is, how the public schools are supported, how a jury is made up, what the coroner has to do and why he rarely does it well. All of these interesting things one may know, however, in a general way without having gained a broad grasp upon the historical development, the successes and failures, and the practical problems of our government, such as present-day conditions demand of intelligent and responsible citizens. We come now, therefore, to a broader and a more detailed study, with more background, more comparison, more attempt at interpretation. There will be no lack of new facts to learn; the oldest, most experienced, and most observant statesmen in Washington find something new, and perhaps something puzzling, in our governmental system every year, and almost every day. But we shall make no effort to amass facts —at all events data of a statistical nature—for their own sake; rather, our emphasis will be upon principles, methods, problems, tasks, and occasionally theories.

CHAP. I

Background for the study of American government

This leads us to say that we shall begin at a point which, at first glance, appears far afield. Indeed, for a time we shall seem to be rather cavalierly ignoring our subject altogether. The reason is that the sort of study of American government which we have in view presupposes a body of knowledge which the student who uses this volume can hardly be expected to possess; and the building up of this knowledge must be our first concern. To be more specific, we must prepare our minds for an illuminating and profitable analysis of our American system of government by looking somewhat closely into the nature of government in general, and of the state as an institution shaped by human experience in widely separated lands and ages. How did men come to be grouped and organized in states? What are a state's necessary features or attributes? What is the difference between a state and a nation? How did government arise? What are the various kinds of states and of governments? What do we mean by the term "sovereignty," which looms large on almost every page of our national history? What are the objects of government? What is law, and what are its sources? When and how was the principle of representation introduced? What is the difference between a constitution and a statute?

It does not have to be argued that if we can get some clear notions on these matters, and others of the kind, we shall be able to view our American plan of government with a perspective and a grasp that will add much to the profitableness of our study.

Having laid this foundation, we shall be prepared to consider in some detail the origins of our American political ideas, usages, and organizations; to trace, in the large, the evolution of our governmental system from 1789 to the present day; to describe the national, state, and local governments as they now operate, not failing to take note of significant developments during the Great War and the ensuing period of reconstruction; and to analyze the machinery and activities of political parties—organizations which are hardly the less important because among us they work mainly outside, rather than, as in England, mainly inside, the governmental system. Whenever specially instructive, comparisons will be drawn between American and English, French, Swiss, and other foreign political forms and practices.

Reasons for studying government

Why study government at all? There are at least three good reasons. The first is that the building up and carrying on of governmental systems is one of the most universal and absorbing

of human activities. Aristotle said that man is a political animal; and certainly no one can go far toward understanding human history and achievement without taking account of political organization and life. As an historical and social phenomenon, government would be decidedly interesting, even if it did not touch us personally at all. But the second reason for studying government is that all of us live under governmental organization of some kind, and that the conditions of our existence are largely determined by the form which this organization takes. Government envelops us as does the air we breathe. It is government that constructs our highways, builds our schoolhouses, lays our sidewalks, guards us against contagious diseases, protects us when we travel abroad, delivers our letters, hears and adjusts our complaints against our neighbors, safeguards our lives and property. When a man votes, pays his taxes, buys a box of cigars, marries, is divorced, goes into bankruptcy, ships a consignment of goods, inherits an estate, brings a law-suit, has a deed recorded, purchases a postage stamp, deposits money in a bank, or indeed receives or pays out money in any form, he is dealing—though he may not stop to think about it—with government, or acting under regulations that government has laid down. That the citizen should be fully informed upon the history, organization, functions, and workings of the government or governments which hold the power of life and death over him hardly requires argument.

Responsibility of the people for the character of their government

But there is a third and stronger reason for the study of government. In the United States, and happily in most parts of the world today, it is the people who govern. It is for the enfranchised citizen himself to say what laws shall be made and who shall make them, what taxes shall be levied, how the revenues shall be spent, how large an army shall be maintained, what regulations shall be imposed upon commerce and business, whether officers shall be subject to popular recall, what powers the state governor and the state legislature shall have, whether the foreign-born shall be allowed to vote before they are naturalized, what shall be the nation's policy toward Mexico. Government is, in most countries, what the people make it. If it is wasteful, corrupt, arbitrary, the masses can no longer lay the blame on a king, or on his ministers, or on a ruling aristocracy. They are themselves the rulers. They do not ordinarily, it is true, make laws, administer, and judge directly. But they frame, or assent to, the

CHAP. I

constitutions under which governments are organized, and they choose the law-makers and many of the administrators and judges. The fundamental object of the study of government is, therefore, not mental training, nor yet the mere acquisition of interesting and valuable information, but the promotion of intelligent and responsible citizenship.

Relation of "government" (or political science) to other studies:

Books and courses of study pertaining to government are commonly listed under the general head of "political science," which may be conveniently defined as the organized body of knowledge pertaining to the state; and it will be well before going farther to take brief account of the relation which this subject of study bears to some others in the so-called "social science" group. The fundamental social science is sociology, which analyzes and describes in a systematic way the life of men in groups or aggregates. Thus conceived, sociology embraces the larger part of history, almost all of political science and political economy, the whole of law, and much of religion. Obviously, the subject is too vast to be mastered by any single man or limited group of men. Hence scholars have established certain boundaries which, although somewhat shifting, give sociology, for working purposes, a more restricted scope and preserve for the more specialized social sciences a recognized field and position. It thus comes about that the sociologist yields to the political scientist the observation and interpretation of such of the social relationships

1. Sociology

of men as are of a distinctly political character. The sociologist delves into the organization of primitive society, studies the clan and the tribe and the race, traces the development of customs and manners, views the rise of labor systems, watches the growth of religions, measures the advance of general culture, seeks out the laws of population; but he gives attention only incidentally to the forms and conduct of government. The political scientist, on the other hand, limits his studies to political thought and action, and therefore to those divisions of mankind which are in a relatively advanced stage of civilization.

2. Economics

Another social study to which political science bears close relation is political economy, or economics. From the days of Aristotle to the eighteenth century political economy was, indeed, conceived of as a part of the science of the state. The subject, as understood nowadays, deals with the individual and social activities of man in the production, consumption, and distribution of goods and services. In so far as these activities are subject to

government regulation, the field of economics overlaps that of political science. The amount of such regulation is steadily increasing; the two fields grow less separable, rather than more so. One has only to think of taxation, regulation of commerce, labor legislation, workingmen's insurance, banking, currency, and the control of immigration to be impressed with the extent to which the economist and political scientist must nowadays work together.

3. History

Political science is also closely related to history. An English historian of the last generation was fond of saying that "history is past politics and politics present history." Literally understood, the statement is not true; history is a great deal more than politics, and a considerable portion of politics (or political science)—especially on the speculative side—is not history. None the less, history acquaints us with the experience of men in all lands and ages; and in so far as that experience is political, the record of it becomes an indispensable basis of political science. In turn, political science, by bringing together the data of history, interpreting the past in a philosophic spirit, and determining the legal and governmental conditions that make for human progress, furnishes history one of its main reasons for being. "History without political science," says another English scholar, "has no fruit; political science without history has no root."[1]

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[1] J. Seeley, *Introduction to Political Science*, 4.

CHAPTER II

THE NATURE AND ORIGINS OF THE STATE

What is a state?

The student of government quickly finds that what he has to deal with is the machinery and methods by which states are enabled to fulfill the purposes of their existence. Every government, in the political sense, is the government of a state. The government which we are to study in this book is the government of a state known as the United States of America. Obviously, before going farther we must be sure that we know what a state is, what its necessary attributes are, and what varied forms it may assume. No question is of more practical importance: the Civil War was a contest over the nature of our American state; the World War sprang fundamentally from opposed conceptions of the state held in Germany and in other European countries.

Various uses of the term

Consideration of this matter is the more necessary for the reason that in everyday speech the term "state" is used in half a dozen different senses, some of them quite incorrect. Thus we often refer to geographical divisions such as China, Russia, or Australia as "states," when we are really thinking only of geographical divisions, or countries. The Germans term Saxony and Bavaria and Prussia states, although no one of these political areas has the requisite attribute of independence. We speak of New York and Virginia and Illinois as states, and rarely or never refer to the United States as a state, although in reality only the latter can strictly be so designated. Definitions are almost as numerous as writers on the subject, and we shall find that description, rather than definition, opens the way to a proper understanding. Here, however, are two definitions which are as serviceable as any. "The state," says the German writer Bluntschli, "is the politically organized people of a definite territory."[1] "The state, as a concept of political science and constitutional law," says an American authority (Garner), "is a com-

[1] *Allgemeine Staatslehre*, I, 24.

munity of persons more or less numerous, permanently occupying a definite portion of territory, independent of external control, and possessing an organized government to which the great body of inhabitants render habitual obedience."[1]

Essential elements of a state:

These definitions—especially the second—have at least the merit of very well indicating what are the essential factors or elements in a state. As many as six appear: (1) population; (2) territory; (3) unity; (4) political organization; (5) independence; and (6) permanence. Population and territory may be regarded as the necessary physical bases of a state. It goes without saying that a state cannot exist without people. How many people are necessary to its existence, and what relations should be maintained between number of inhabitants and area, are questions which political writers from Aristotle onwards have discussed, usually with no great profit. It is obvious that there have been, and are today, states of very scant, and others of very vast, population, and about all that one can say is that there must be people enough to maintain political organization and to support a government. San Marino, with a population of ten thousand, and an area of thirty-two square miles, is a state no less than the United States with its hundred and five millions spread over a continental domain.

1. Population

A fixed territory would seem also to be essential to a state. It is true that recognition of statehood has sometimes been extended to peoples who had no actual sovereignty over a definite territory. Thus in 1918 the Allied Powers, and also the United States, recognized the Czechoslovaks as constituting a state, although their lands were as yet parts of Austria-Hungary. In this case, however, recognition was rather in anticipation of an end to be obtained by the defeat of the Central Powers than an assertion that a full-fledged Czechoslovak state actually existed at the moment; certainly if the Dual Empire had been on the winning side and Bohemia and the remaining Czechoslovak lands had been kept under Hapsburg rule the statehood of Czechoslovakia would have been considered as never having been anything more than a fiction, or at best a hope. The German tribes moving southward and westward into the Roman Empire at the beginning of the Middle Ages were not states. They founded states, but only when they established themselves permanently in Gaul, Italy, Britain, and other definite territories. Since ancient times the Jews have

2. Territory

[1] *Introduction to Political Science*, 41.

CHAP. II

formed no state, because they have occupied and controlled no particular region of the earth.[1]

3. Unity

But a group of people living within a definite territory does not necessarily form a state. The inhabitants must be united in a "body politic"; they must have a government; they must be free from external control; and their association for political purposes must have the quality of permanence. First, the state must have unity. The people that compose it may submit to and support it because they wish to do so, or because they are forced to do so; they may be of diverse races, languages, religions, ideas, and customs; their governmental system may be "unitary," as in France, or "federal," as in Switzerland and the United States. But the state itself is, and must be, an entity, no less indivisible and hardly less immutable than the individuality of a person.[2]

4. Political organization

In the second place, there must be political organization. That is, there must be recognized agencies through which the public will can be ascertained, transmuted into laws, and carried into effect. The machinery of government may be elaborate, as in highly developed states like France and Switzerland, or it may be simple and rudimentary, as in backward states like Abyssinia and Siam. But some form and degree of organization there must be.

5. Independence, or sovereignty

Then, too, the state must have supreme and unlimited authority. It must be independent of foreign control, and it must be in a position to impose its will without restraint upon all persons, associations, and things within the range of its jurisdiction. This attribute of sovereignty is so vital that more will be said about it presently. Meanwhile let it be noted that a final requisite

6. Permanence

of the state is permanence. Not that states endure forever; on the contrary, history tells of many states that have broken up and disappeared. But a true state cannot be a mere product of caprice, something to be created today and destroyed tomorrow. It must show a reasonable degree of stability and continuity. And *the state*, as an institution in the abstract, is, so far as we can see, absolutely permanent. Experience shows it to be a necessity of human existence. When one particular state dissolves or is overturned the people who have been associated in it are certain to pass under the jurisdiction of some other state which

[1] As a result of the Great War, Palestine has become a state. But its population is far more Arab than Jewish. Besides, Great Britain's mandate leaves it only theoretically independent.

[2] W. F. Willoughby, *Government of Modern States*, 11.

has conquered them, which they have joined voluntarily, or which they have themselves created.

These, then, are the necessary elements of a state—population, territory, unity, political organization, sovereignty, permanence. A state is not a piece of territory; it is not an aggregation of people; it is more than a government. Territory and people are its physical bases, and government is the instrumentality through which it speaks and acts. But the state is itself an organism transcending any and all of its component factors. In a sense it is an abstraction; yet it is no fiction. Nothing is more real in this world of ours than states.

Importance of sovereignty

Aside from clearly indispensable physical factors, the most essential and distinctive attribute of the state is sovereignty. It is true that writers sometimes speak of part-sovereign, or even non-sovereign, states. But such usage is inaccurate. Without full and unlimited sovereignty there can be no state. For the student of government it is therefore supremely important to know what sovereignty is and how it determines political forms and actions. In the entire realm of political science there is perhaps no subject upon which men have speculated more freely, from the days of Aristotle to our own. Sharp controversies have raged around the question; the fate of states—including the United States—has hung in the balance while the discussion proceeded. Unfortunately, most of these controversies have been at bottom political rather than philosophical, each theory, in the words of Bryce, having been "prompted by the wish to get a speculative basis for a practical propaganda."[1] There will probably always be wide differences of opinion upon the immediate bearings of the concept of sovereignty in particular situations. But on the ultimate nature of sovereignty—which is the only point with which we are now concerned—scholars have come into substantial agreement; and the essence of their views can be presented briefly.

What sovereignty means

The term "sovereignty" is derived from the Latin *superanus*, meaning supreme. Many definitions of it can be found in the books. Perhaps this is as satisfactory as any: Sovereignty is the original and absolute authority of the state over all individuals, associations of individuals, and things within the field of its jurisdiction.[2] To put it differently, sovereignty means the ultimate right to issue commands and to compel obedience. The

[1] *Studies in History and Jurisprudence*, 552.
[2] Adapted from J. W. Burgess, *Political Science and Const. Law*, I, 52.

CHAP. II

ultimate *right,* be it observed; for sovereignty is a matter of authority, rather than of power. Whatever individual or body has a title to supreme control is sovereign, whether or not there is the power, or even the will, to exercise such control. It is by virtue of its sovereignty that a state determines what kind of government it will have, sets up a constitution, fixes the rights and privileges of individuals, makes and enforces laws, and assumes to deal with other states as being their co-equal. To say that a state is sovereign is equivalent to saying that its authority is without limit. A *government* has only such authority as is given it. But the *state* knows no legal restraints. As will appear presently, the individual has enforcible rights as against the government, but none as against the state; and while there are many things which it would be morally wrong for the state to do—legalize murder, to take an extreme example—there is nothing that it has not a full and inherent legal right to do.[1]

Is sovereignty desirable?

A question that has been specially prolific of controversy is, Can sovereignty be divided? On the face of it, "divided sovereignty" would seem to be a contradiction of terms. How can supreme authority be split into two or more parts without ceasing to be supreme? And yet, the constitutional history of the United States during the first three-quarters of a century after 1789 turned to a large extent upon this very question, and the Civil War resulted mainly from deep-seated differences of opinion upon it. One group of people, whose views were ably set forth by Webster in the debate with Hayne in 1830, held that only the United States was sovereign. A second group, best represented by Calhoun, held that sovereignty was lodged exclusively in the several states. A third group, supported by Hamilton and Madison in the "Federalist" and by the oft-expressed opinion of the Supreme court,[2] held that the United States was sovereign as to

[1] The fact must be mentioned that certain newer schools of radical political thought, *e.g.,* French syndicalism and English guild socialism, deny the validity of this view of sovereignty. They abhor the idea of the "absolute state" and look to a disintegrated form of economic-political organization which will leave each community, or trade, or other lesser group the master of its own affairs. Their discussions are apt to be befogged, however, by confusion of state and government, and by failure to appreciate that an absolute state is no menace so long as the government can be—as practically all governments are—restricted in its powers. On the growth of the idea of the "pluralistic" state see H. J. Laski, *Authority in the Modern State,* Chap. I; E. D. Ellis, "The Pluralistic State," *Amer. Polit. Sci. Rev.,* XIV, 393-407 (Aug., 1920); and F. W. Coker, "The Technique of the Pluralistic State," *Amer. Polit. Sci. Rev.,* XV, 186-213 (May, 1921).

[2] Chisholm *v.* Georgia, 2 Dallas, 435 (1793); Ware *v.* Hylton, 3 Dallas, 232 (1796); the License cases, 5 Howard, 504, 538 (1846).

the powers conferred upon it in the constitution and that the states were sovereign as to those which were reserved to them. Unanimity of opinion will probably never be reached, either on the location of sovereignty in the United States or on the general question whether sovereignty can be divided. But the majority of political scientists and jurists nowadays reject the doctrine of divisibility, holding that Calhoun was right when he declared that sovereignty "is an entire thing," that "to divide it is to destroy it," and that "We might just as well speak of half a square or half a triangle as of half a sovereignty." [1]

Divided exercise of sovereign powers

Much of the obscurity that surrounds the subject arises from the failure to distinguish sovereignty itself from the powers and activities through which the sovereign will is manifested. The former cannot be divided; the latter can be parceled out at pleasure. Thus in the United States sovereignty, according to the view that now generally prevails, resides in the people, collectively considered. The people in the mass cannot, however, perform the continuous functions of the state; they cannot, as a body, manage foreign relations, organize and control the army and navy, collect the revenues, try cases, take censuses, or inquire into the operations of interstate carriers; they could make laws only with much difficulty and delay. What happens is that they set up governments to which these and other functions are entrusted; and some of the functions they assign to the government of the United States and others they assign to the governments of the several states. The government at Washington is not, therefore, a sovereign, but an agent of the sovereign; and, similarly, the government at Albany, at Harrisburg, at Indianapolis.[2] "There is no partition of sovereignty, no division of the supreme

[1] *Works*, I, 146. This, of course, does not mean that Calhoun was also right in attributing sovereignty to the *states*.

[2] There is, of course, a sense in which a government, or even a given part of a government, is a sovereign. In the eyes of the lawyer, the sovereign is the individual or body whose edicts are to be understood to be the commands of the state, whether or not they express the wishes of the people composing the state. Thus the legal sovereign of eighteenth-century France was the Bourbon king; and the legal sovereign of modern Britain is Parliament. Back of the legal sovereign, however, stands the political sovereign, *i.e.*, the authority that could depose a Bourbon or bring the British Parliament to a perpetual halt. In a democratic country this sovereign may be understood to be the electorate; it is ultimately the whole mass of the population, whether enfranchised or not. The real, political sovereign is in all states the people, whether they actually control public affairs, whether they deliberately turn over these affairs to a ruling class, or whether they voluntarily or involuntarily submit to the domination of a despot. See J. Bryce, *Studies in History and Jurisprudence*, 505-523.

CHAP. II

will. There is a division by the sovereign itself of governmental powers and a distribution of them among two sets of organs, but no division of the will itself . . . That power and that alone is sovereign in a federal union which can in the last analysis determine the competence of the central authority and that of the component states, and which can redistribute the powers of government between them in such a way as to enlarge or curtail the sphere of either. That power is not in the central government or in the states; it is over and above both, and wherever it is, there is the sovereign."[1] It hardly needs to be repeated that, in the United States, the power referred to rests with the people. There is a sense in which it would be more accurate to say that it rests with two-thirds of both houses of Congress and the legislatures of three-fourths of the states; for this combination can make any change whatsoever in the national constitution.[2] Such action may, however, be annulled by the people, through the simple expedient of electing congressmen and legislators who will undo what has been done, or do it in an entirely different way.

"State," "government," and "nation"

In everyday speech, and even in reputable books, the terms "state," "government," and "nation" are often used interchangeably, as if meaning the same thing. A moment's reflection will show that this is erroneous. In the first place, a state is not a government, and vice versa. A state is a "body politic," a sovereign community politically organized, while a government is the instrumentality through which such a community determines and carries out its policies. "The government is an essential element or mark of the state, but it is no more the state itself than the brain of an animal is itself the animal, or the board of directors of a corporation is itself the corporation."[3] A state may change its government any number of times, and yet be the same state. France oscillated between monarchy and republicanism for a hundred years, but the French state went on as uninterruptedly as if the Bourbons had never fled from Versailles.

"State" and "nation" distinguished

"State" and "nation" are also often confused. The first term has a political and legal meaning, the second denotes rather a racial or ethnical concept. A state includes all the people living within given boundaries and subject to a common government. These people may be of different races, languages, religions, man-

[1] J. W. Garner, *Introduction to Political Science*, 262-263.

[2] Accuracy requires it to be observed that no state can, without its consent, be deprived of its equal suffrage in the Senate.

[3] Cf. definitions quoted in Garner, *op. cit.*, 45-46.

ners, and aspirations; the state, as such, knows nothing of these variations. A nation, on the other hand, is a body of people inhabiting a given territory, descended from a common stock, speaking the same language, and having, in general, a common inheritance and a common civilization.[1] Political organization is not to be implied. If it so happens that a body of people forming a nation also has a separate organization for purposes of government, state and nation become practically identical. In early times this situation was seldom realized, for states were usually built up by sweeping peoples together with little regard for racial or cultural relationships. Even at the opening of the present century state and nation hardly coincided anywhere in Europe except in Holland and the Scandinavian countries. Austria-Hungary numbered at least twenty different races or fragments of races. Russia was mainly Slavic, but included many non-Slavic elements—Lithuanian, Finnish, Tartar, Rouman. On the other hand, several nations, or nationalities,[2] were divided between two or more states. The Polish nation (there was no Polish state) lay partly in Russia, partly in Germany, and partly in Austria. The German nation comprised important elements in Austria and Switzerland as well as in the German Empire. The French nation included, along with the population of France itself, the Walloons of Belgium.

Tendency to national statehood

Intermixture of peoples will forever make it impossible to attain a state system based upon a strict racial and cultural homogeneity; and the history of modern Switzerland, notably placid despite the mingling of German, French, and Italian populations, happily indicates that human well-being is not dependent upon such a system. None the less, groups of people who are of a common nationality inevitably seek common and separate statehood. This pressure for *national* statehood was, indeed, a leading factor in European history in the nineteenth century. It brought about the unification of Germany and Italy. It gave rise to Pan-Slavism and Pan-Germanism. It led the Italians to seek possession of their "unredeemed" territories, the Serbs to protest against Austria's annexation of Bosnia and Herzegovina, the Poles to clamor for

[1] J. W. Garner, *Introduction to Political Science*, 44.

[2] These terms do not mean quite the same thing. A nation is a homogeneous population strongly predominating in a given area; a nationality is a minor ethnic group, which may inhabit a certain portion of this area almost exclusively, or may be scattered thinly over the whole. The Germans in central Europe composed a nation, the Poles in the German Empire a nationality.

CHAP. II

the revival of their ancient kingdom, the Irish to agitate for "home rule," or even complete independence. It directly or indirectly caused most of the wars between 1848 and 1870. The longing of nations, and even of minor nationalities, for political autonomy was, as everybody now understands, one of the main reasons why the old European order could not endure. The World War opened the door of statehood to the Poles, the Finns, the Czechoslovaks, and other national groups, and state boundaries and national boundaries now coincide in Europe as never before. Men have learned by bitter experience that in organizing or reorganizing states regard must be had, wherever possible, for the principle of nationality.[1]

The origin of the state

How has it come about that men are everywhere found, throughout the civilized world at all events, living under organized political authority? In other words, how did the state come into being? We know the way in which many particular states were created. We know how England and Italy and the United States arose. As a result of the World War, new states—Poland, Czechoslovakia, Jugoslavia—have, indeed, been created under our very eyes. But how and when did the first state arise? How did the state *as an institution* come into existence?

Principal theories:

These questions are difficult to answer positively, for the reason that the beginnings of the state far antedate recorded history. Aristotle indeed tells us that the state was the highest and last of the associations formed by man. But even in his day, more than twenty-two hundred years ago, the state was an ancient institution, whose origins were no better known than they are at the present time. Unable to penetrate the obscurity which surrounds the subject, writers on political matters have been obliged to content themselves with speculation; and of this there has been a very great amount, from the days of Plato and Aristotle onwards.

1. Divine ordinance

Four or five main theories have been developed. The first is that of divine origin. The adherents of this doctrine hold not only that the instinct for orderly association was divinely planted in human nature, but that God vested political power in certain persons or groups of persons, who thus became his vicegerents on earth. In the Middle Ages, when political writers were apt to be

[1] J. W. Garner, *Introduction to Political Science*, 49-56; W. A. Dunning, *Political Theories from Rousseau to Spencer*, Chap. VIII; J. H. Rose, *Nationality in Modern History*, Chaps. VIII-IX.

churchmen and theologians, this view was widely held, and in the sixteenth and seventeenth centuries it became a chief reliance of the monarchical governments—notably of the Stuart kings in England and the Bourbon rulers of France—in their resistance to the growing ideas of popular sovereignty. The whole notion of the divine right of kings springs directly from it. It is hardly necessary to add that the theory never had any basis of fact, and that it now has no standing among political scientists.

2. Social contract

A second theory is that of the social contract. It assumes that there was a time when men were entirely without political organization—when the only laws governing their actions were those prescribed by the instinct of reason or by nature itself. Gradually this "state of nature" breaks down. For reasons upon which the exponents of the theory are by no means agreed, people find it desirable to enter into new and definite relationships; and this they do by coming together and agreeing to set up a civil society or body politic. The individual submits his hitherto unfettered will to the will of the group; in return, he receives protection, and perchance other benefits. To fix rights and duties, a code of law arises; to execute the public will, a government is created; and thus by the deliberate bargaining of a body of men having common interests a state is brought into existence.

Development of this theory

This theory has much attractiveness. Traceable as far back as Plato, it became, in the seventeenth and eighteenth centuries—when it was persuasively expounded by the English writers Hobbes and Locke and by the French philosopher Rousseau—a favorite political doctrine. The original application of it was made, as has been explained, to the formation of states by the members of communities previously possessing no civil authority. A second application, which also gained wide acceptance, was to the contractual relationships conceived of as being entered into between a community already politically organized and a particular magistrate or ruler. The two processes are, of course, quite distinct. The one is a true social contract, and establishes a state; the other is rather a political compact, and establishes a government. The doctrine of contract, in both of these forms, was at the zenith of its influence in the second half of the eighteenth century, and was quite familiar to Thomas Jefferson and those who worked with him in building the new American nation. The Declaration of Independence boldly proclaimed that governments derive their just

CHAP. II

powers from the consent of the governed, and similar sentiments are to be found in most of the state constitutions framed in the Revolutionary period, especially in their bills of rights.[1]

Objections

In so far as it seeks to account for the origin of the state (as distinguished from particular governments), the doctrine of the social contract is not nowadays widely held. It has no foundation in history; for although there are known instances in which people finding themselves without a political organization have contracted to set up one—the Mayflower Compact of 1620 is a notable illustration[2]—there is no case on record in which a body of men who had never formed part of any state deliberately fabricated a state for themselves. Furthermore, it is difficult to believe that a primitive folk, ignorant of government, would, or could, consciously set about the creation of that most complex of human institutions, a state. "Men must have known," says one writer, "what a government was before they could make one." Still more necessary does it seem that they should have had political experience before building—if they ever did consciously build—a state. Like the divine origin theory, the twin theories of the social contract and the political compact gained their remarkable vogue because of the practical use that was found for them. James I, Louis XIV, and their brother monarchs discovered in the divine theory a main prop of their power; oppressed and discontented peoples found in the compact theories a plausible basis for resistance to tyranny.

3. Development from the family

A third theory seeks to account for the state as an outcome of the expansion of the family. People who hold this view find in blood relationship a social tie which eventually becomes also a political bond. They assume that the original social unit was the patriarchal family, composed of a man, his wife (or wives), his unmarried daughters, and his sons, with their wives and families; although some maintain that before the patriarchal family group arose, people lived in miscellaneous hordes or packs, in which descent was traced in the female line. At all events, the view is

[1] C. E. Merriam, *History of American Political Theories*, 49. The doctrine is set forth in the preamble of the Massachusetts constitution of 1780 as follows: "The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."

[2] As is pointed out by Garner, in this case the covenanters expressly acknowledged that they were "loyal subjects" of an existing sovereign and their purpose was not to create a state but to extend an existing state to a country not yet inhabited by civilized peoples. *Introduction to Political Science*, 109.

that by natural stages the family broadens into a clan, the clan becomes a tribe, and the tribe becomes a nation, which is the ethnical basis of a state. The family is ruled by the father; the clan, by a leading kinsman, or patriarch; the tribe, by a chief; the nation—which at length organizes itself as a state—by a king.

Lack of evidence

This theory is simple and at first glance plausible. It has the weight of influential support, beginning with Aristotle himself. But the most that can be said for it is that it probably supplies the explanation of the origin of a particular state here and there, without furnishing any general clue to state development in general. There is no historical proof that either the patriarchal or the matriarchal family was universal in primitive society, or that the state regularly appeared only after the clan and the tribe had taken form. Indeed, some authorities hold that the actual course of social evolution was quite the reverse of that described—that the tribe was the oldest social group, that the tribe broke into clans, and that the clan disintegrated into families, and these, in turn, into the individual members of society.[1]

4. Force

Still another view is that the state is a product of force. In times of primitive lawlessness, we are told, strong men established their sway over the weak; or, perchance, military leaders took advantage of their preëminence to hold their followers permanently under control. The leader becomes a chieftain, the chieftain becomes a king, the tribe becomes a kingdom—all by the use, or threat, of compulsion. The kingdom may continue to expand by conquest; it may become a mighty empire, holding sway over vast and unwilling populations. But here again there is doubt. That power to compel obedience and to resist attack is a main characteristic of the modern state, no one needs to be told. That some states, modern as well as ancient, were created by "blood and iron," is equally familiar. But that force was the sole, or even the main, factor in the creation of the original state few scholars of today are prepared to believe. Speaking broadly, the rôle of force seems to have been the consolidation of states rather than their initial establishment.

No one of these theories satisfactory

What, then—if not divine ordinance, or social contract, or patriarchal authority, or physical compulsion—shall we look upon as the original impetus or method of state-building? It would be agreeable to be able to reply with some explanation on its face as simple, consistent, and plausible as the four that have been

[1] E. Jenks, *History of Politics*, Chaps. I-II.

CHAP. II

discarded. But regard for the truth forbids. The precise circumstances under which human beings were first grouped in states must forever remain unknown. Both history and reason, however, assure us of certain things. The first is that the state was not suddenly and mechanically made. It is not to be referred back to any given point of time; it was not the outcome of any plan; it can be ascribed to no single influence or power. Rather, it was "a growth, an evolution, the result of a gradual process running throughout all the known history of man, and receding into the remote and unknown past."[1] Individual states have sometimes been created by specific acts, almost at a stroke; but the state as an institution is much too complex, and corresponds to human needs far too advanced, to have been brought into being by fiat.

Yet truth in all of them

A second fact to be observed is, however, that there are elements of truth in all of the theories presented above. "The divine element," says an able writer, "appears in the fact that the Creator has implanted in the human breast the impulse which leads to association, and in the part played by religion in bringing primitive man out of barbarism and accustoming him to law and authority. The element of compulsion exercised by those who possess natural superiority is a powerful ally of both religion and evolution in bringing the natural man into political and social relationship with his fellows. Finally, the elements of contract and consent which lie at the basis of all association play an important part in the process of establishing and reorganizing particular governments. No one of these elements alone accounts for the existence of the state, but all working together, some more prominently than others; and all, aided by the forces of history and the natural tendencies of mankind, enter into the process by which uncivilized peoples are brought out of anarchy and subjected to the authority of the state."[2]

Classifications of states

In everyday speech we use phrases that would lead one to suppose that there are many kinds of states. We talk about large states and small states, rich states and poor states, monarchical states and republican states, unitary states and federal states. It is important to observe, however, that in their ultimate nature all states are alike; whether in Great Britain, in China, or in Abyssinia, the things that determine statehood are the same. A state

[1] S. Leacock, *Elements of Political Science*, 41.
[2] J. W. Garner, *Introduction to Political Science*, 122.

is a state, precisely as a human being is a human being; if it exists at all, it is because of having the essential attributes of its kind. There is a sense in which human beings are not susceptible of classification; they are all alike—one homogeneous order of creation, set over against fishes, trees, rocks, and other orders. Similarly, there is a point of view, *i.e.*, the purely legal one, from which states must be regarded as not capable of being thrown into differentiated groups. However, we know that after due allowance has been made for the faculties that human beings possess in common, simply because they *are* human beings, many important differences are found to exist among them. So it is with states; and if the fact of legal similarity be duly borne in mind, no harm can arise from some attempts at classification.

Two bases: 1. Manner of exercise of sovereign powers

What bases of classification, however, can be employed? The question is not an easy one. It is obvious that classifications according to area, population, or resources have no political significance; just as classifications of individuals according to their weight or the color of their hair would have no social value. The basis of grouping must lie closer to the nature of the state; that is, it must be, somehow, political. Two classifications which meet this test are of some practical value. In the first, the basis is the number of persons through whom the sovereign power of the state is exercised. From this point of view, states were classified by Aristotle as monarchies, aristocracies, and democracies; and while the classification has often been criticized as mechanical and arbitrary, it still holds a recognized place in political thought.[1]

2. Degree of unity in the government

The second classification takes as its basis the degree of unity in the government. On this basis states fall into two groups, according as their governmental system is unitary or federal. A unitary government is one in which all functions and powers are gathered in the hands of a single set of political agencies, as in France, Italy, and Japan. A federal government is one in which functions and powers belong in part to a central, common political organization and in part to a number of divisional political organizations, as in Switzerland, Brazil, and the United States. There is no such thing as a federal state; all states are unitary. But the government of a state may be either unitary or federal. Confederations, such as the United States under the Articles of Confederation and Germany from 1815 to 1866, do not enter into

[1] See J. W. Burgess, *Political Science and Comparative Constitutional Law*, I, 71-74.

the classification; for a confederation is not a state, but rather a league of states. Similarly, states that are joined by a personal union through the crown—as were England and Hanover from 1714 to 1837 and Denmark and Schleswig-Holstein from 1776 to 1864—remain individually sovereign, and hence do not form a distinct type of state, or even a single state at all.

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CHAPTER III

STATE FUNCTIONS AND RELATIONS

What are the purposes of the state?

We have seen something of the nature and origins of states. The next question is, For what purposes do states exist? At first glance this may seem a needless query. States exist, we are likely to be told, to regulate the affairs of men, for the good both of individuals and of society. But this is a very general answer. Can we not get a fuller and clearer idea of the reasons why France, Japan, Switzerland, and the state which we are to study, *i.e.*, the United States, are upheld and perpetuated by the people who compose them? Can we not analyze the aim of the state in general, in so far, at least, as to note the functions which the state is essentially and peculiarly fitted to perform? In a sense, to ask the purpose of the state is equivalent to inquiring what is the object of government. The state, however, is more fundamental than government; the principal thing that the state does is to create and maintain government. Without government there would be no need of the state—indeed, could be no state. Hence any question as to the purpose for which government exists becomes a question involving the object of the state itself.

The anarchist view

But it will not do to assume that all men regard the state as having a legitimate purpose. There are schools of thought which teach that the state is essentially and necessarily an instrument of tyranny, and that therefore it ought not to exist. This is at once recognizable as the doctrine of anarchy. People who accept it consider the liberty of the individual the all-important thing and regard the restrictive authority of the state as without benefit or justification. They do not in all cases approve of violence as a means of breaking down the state's authority, and they do not have in view an absolutely atomistic society, devoid of all cohesion and united action. But they would do away with state compulsion, and would substitute for it the purely voluntary association of such individuals as might find it to their advantage to combine for the protection of their lives or property, or for other purposes. It is not difficult for us to see that these so-called voluntary associations

CHAP. III

would be of no use unless they exercised coercive power against non-members, that, if effective, they would be likely to prove no less restrictive and arbitrary than states, that they would almost certainly be unstable and transitory, that the liberty which would be gained by the removal of state control would be only that of the strong to exploit the weak—in short, that anarchism is utterly without basis in either logic or common-sense. Its doctrines have, however, at times made strong appeal both to philosophic radicals and to discontented workingmen.[1]

The individualist view

The anarchists hold that the state is neither desirable nor necessary. Another school takes the view that while the state is not inherently desirable, it is a practical necessity. This is the individualist school, whose chief tenets are (1) that if human nature were so refined that men would always deal justly one with another there would be no need of the state; (2) that since this happy condition does not exist, some coercive force is necessary; (3) that this force can be applied only by the state acting through its recognized organs of government; (4) that the proper province of the state does not extend beyond the protection of life, liberty, and property; and (5) that as man's regard for order and justice increases, state control should be relaxed until, theoretically at least, the vanishing-point is reached.

Exponents of this view

This body of doctrine took form mainly in the second half of the eighteenth century, when western Europe was stirred by powerful protests against the despotic and paternalistic policies pursued by the majority of states. On the economic side, the doctrine found application in the teachings of Adam Smith and the French physiocrats, in the repeal of countless trade and industrial restrictions, in the triumph of the principles identified in England with the Manchester school and commonly summed up in the phrase *laissez-faire*. On the political side, the doctrine was similarly reflected in the overthrow of absolutism in France, the relaxation of government control over many phases of human activity, and the emphasis placed upon individual rights in the American Declaration of Independence and the Revolutionary state constitutions. The Prussian scholar Wilhelm von Humboldt asserted that the state should "abstain from all solicitude for the positive welfare of the citizens and ought not to proceed a step farther than is necessary for their mutual security and protection

[1] The best exposition of philosophic anarchism is to be found in Prince Kropotkin's *Fields, Factories, and Workshops* (1899).

against foreign enemies."[1] The English sociologist Herbert Spencer argued that the state should not maintain a postal system or a mint, that it should not undertake to regulate labor in mines and factories, that it has no right to interfere with the wise severity of nature's discipline by legislation on poor relief and on matters of health. Indeed he went so far as to contend for the right of every individual to decide for himself whether he will obey a government or will "adopt a condition of voluntary outlawry."[2] The French philosopher Jules Simon proclaimed the supreme obligation of the state to be to make itself useless and to prepare for its own extinction. And an American president, Thomas Jefferson, pronounced that government best which governs least, and in his messages and inaugural addresses repeatedly mapped out a national program frankly based upon individualistic principles. Level-headed men like Spencer and Jefferson did not expect human nature to attain such perfection that all government could be dispensed with. But this did not prevent them from conceiving of the state, and of government itself, as a necessary evil, or from limiting the proper functions of the state to keeping the peace and punishing crime. For upwards of a hundred years this grudging, negative conception of the state held political action within bounds which seem to most men today intolerably narrow.

The arguments chiefly employed in support of the individualistic view of the state have been (1) that the individual has a "natural right" to be let alone; (2) that each individual, in the long run, knows his own interests best, and, in the absence of arbitrary restrictions, can be trusted to follow them; (3) that the laws of human progress require that the individual shall struggle for himself and survive or fail according to his fitness; (4) that over-government stifles individual initiative and development; and (5) that the state is not omniscient or infallible, as is proved by the large amount of blind, partisan, meddlesome, and unfair regulation for which it has been responsible in the past.

Criticism of the individualist doctrine

There is truth in all of these contentions, and a general presumption may be conceded against state interference wherever no strong positive reason for interference can be shown. However, it can be argued with equal force that as against the state the

[1] In *Ideen zu einem Versuch, die Grenzen der Wirksarnkeit eines Staates zu Westimmen*, written in 1791, though not published until 1852. There is an English translation by Coulthard.

[2] *Social Statics* (London, 1850). See extract in W. R. Browne, *Man or the State* (New York, 1919), 90-99.

CHAP. III

individual has no "natural rights"; that, far from knowing t... own interests best—in such matters, for example, as education ... sanitation—most people have not, and cannot be expected to h... the information or experience necessary for wise decisions; that ... amount of individual comprehension of interests and needs can ... of avail without coöperative action, as for example in the maintenance of schools, the construction of streets, and the regulation of railways; that the competition of individuals which whets the wits and brings capacity to the top can proceed to best advantage only where a superior power, the state, equalizes to some extent the conditions of competition and raises the struggle to a humane and moral plane;[1] and that the errors committed in the name of state regulation, although undeniably many, have been so portrayed by the *laissez-faire* writers as to produce an exaggerated impression. The exponents of the individualist doctrine make the mistake of assuming that state action always and necessarily restricts freedom, that government and liberty are incompatible. The state unquestionably does restrict freedom in some directions. But, on the whole, it makes possible a larger freedom than could be attained without it. Far from being mutually antagonistic, government and liberty are easily reconciled, as the history of all English-speaking, and many other, lands abundantly demonstrates.[2] As an American writer has said, "In reality, wisely organized and directed state action not only enlarges the moral, physical, and intellectual capacities of individuals, but increases their liberty of action by removing obstacles placed in their way by the strong and self-seeking, and thus frees them from the necessity of a perpetual struggle with those who would take advantage of their weakness."[3]

The collectivist view

The crowning argument against the individualist doctrine rests, however, not upon theory, but upon experience. At the middle of the nineteenth century individualism was at flood-tide. Even at that date, changed economic and social conditions, arising largely from the Industrial Revolution, called loudly for the regulative and corrective action of the state; and as succeeding decades passed, the need of such action steadily grew. There had always been those who dissented from the teachings of the individualists;

[1] This aspect of state regulation is fully discussed in H. C. Adams, "The State in Relation to Industrial Action," *Amer. Econ. Assoc. Pub.*, Jan., 1887.

[2] This subject is treated historically in J. W. Burgess, *The Reconciliation of Government with Liberty* (New York, 1915).

[3] J. W. Garner, *Introduction to Political Science*, 291.

and under the stress of the new conditions those doctrines fast fell into general discredit. To the old conception of the state as a necessary evil, and of government as existing only to keep men from injuring one another, succeeded an estimate of the state as the supreme, indispensable, and inherently desirable conservator of human welfare, and likewise a view of government as an active, positive, expanding, regulative force, in no wise restricted to the safeguarding of individual rights. Indeed the emphasis nowadays falls upon rights and obligations of a social, rather than an individual, nature. The state, through the agency of government, curbs individual action all along the line in the interest of the public well-being. It sanctions some industries and prohibits others, and regulates in great detail the conditions of employment. It issues charters to railroad, telegraph, and other corporations and prescribes the manner in which they shall carry on their business and keep their accounts. It licenses and controls banks and insurance companies. It limits combinations of capital and of management when it can be shown that their effect is to restrain trade unreasonably. It compels the citizen to educate his children and to refrain from acts that would endanger the health of the community. It seeks to prevent him from living in a badly ventilated house, or eating adulterated food, or drinking water that is polluted. It says who may teach school, practice medicine, sell drugs, pilot ships, and cut hair.

Notable extension of state regulation

We are accustomed to regard as the greatest fact in modern history the physical changes brought about by science and invention in the mode of human life. But from many points of view even this stupendous transformation is eclipsed by the revolution of thought (for which, indeed, the new physical and economic conditions were mainly responsible) which has led the state to extend its regulative action into one new field after another, and has brought the functions of government to their present amazing proportions. Nowhere have the effects of this political change been greater or more interesting than in our own country, where we shall presently study them in some detail.

Socialism

The reaction against the eighteenth-century philosophy drove some men great distances, and as a result certain schools of thought arose that stand at the opposite pole of the political universe from individualism. The most important of these is the socialist school, which has gained substantial control in Germany and Russia, a large following in France and Italy, and a considerable hold in

CHAP. III

England, the United States, and other lands. There are socialis of many types. But all are agreed that most of the ills of moder society spring from inequalities of wealth and opportunity, an that these inequalities are the natural and inevitable product o the free play of self-interest, of the competition of individua with individual, each seeking his own advantage. Not less regula tion, they say, is required, but more; the state is not an evil, but a supreme and positive good. They would have much more regulation than there is at present in such domains as public health and education. They would bring railroads, canals, ships, telegraphs, telephones, gas works, waterworks, electric light plants, and other utilities under public ownership, national or municipal. But, above all, they would do away with private ownership and control of the instrumentalities of production and distribution of goods. They would have the state itself become, on a grand scale, an owner, employer, and manager, in all that pertains to the economic relationships of men. Private property would not absolutely disappear. But it would be confined to such objects as could not be made the basis of personal power or advantage. Land, mines, mills, factories, machinery, stores, banks and businesses, capital in all of its forms, would belong to the state, and the state would be trusted to utilize these agencies of wealth in such a way as to secure the maximum of justice, enlightenment, and general well-being.

Communism

A variation upon this fundamental socialist program is a cre known as communism, which would go so far in the direction c state control as to force all individuals to lead a common life, an even to eat the same kinds of food and wear the same style of clothing. Despite some interesting experiments in the United States and elsewhere, communism has never made much appeal. But socialism boldly challenges the best thought of the world; and while it can point to no extended trial of its program on a considerable scale, it can cite many impressive triumphs for its principles. The essence of socialism is public ownership and control; and government postal service, government coinage, and government management of railroads, telegraphs, and water-power, whether or not instituted in response to socialist demand, at least give evidence of a growing belief in the efficacy of collective action.

The state not an end, but a means

Enough has been said to indicate how sharply men disagree in their views of the purposes for which the state exists. Whether,

indeed, the state is an end in itself or whether it is only a means whereby individuals attain their several ends, is a question which has been warmly debated through the ages.[1] The ancients thought the state an end in itself, and either flatly denied or sharply curtailed all individual rights and liberties which seemed inconsistent with its exaltation and complete development. Few, if any, people nowadays hold such an opinion; even the socialists, while magnifying the sphere and powers of the state, constantly look to the well-being of the individual citizen as the end to be sought. We may therefore assume that the state is not an end, but a means.

The objects of the state summarized

This, however, merely raises afresh the question of what end, or ends, the state is meant to serve. As has appeared, many answers to this query have been given. If we look for one which takes adequately into account the varying points of view historically developed, we will not do badly to lay hold of the explanation offered by a leading American political scientist, as follows: "The original, primary, and immediate end of the state is the maintenance of peace, order, security, and justice among the individuals who compose it. This involves the establishment of a régime of law for the definition and protection of individual rights and the creation of a domain of individual liberty, free from encroachment either by individuals, or by associations, or by the government itself.[2] No state which fails to secure these ends can justify its existence . . . Secondly, the state must look beyond the needs of the individual as such to the larger collective needs of society —the welfare of the group. It must care for the common welfare and promote the national progress by doing for society the things which common interests require, but which cannot be done at all or done efficiently by individuals acting singly or through association . . . This may be called the secondary end of the state. The services embraced under this head are not absolutely essential to the existence of society, but they are desirable and are in fact performed by all modern states. Finally, the promotion of the civilization of mankind at large may be considered the ultimate and highest end of the state . . . Thus the state has a triple end: first, its mission is the advancement of the good of the individual; then it should seek to promote the collective interests of individuals in their associated capacity; and, finally, it should aim at

[1] J. C. Bluntschli, *Theory of the State*, Bk. V., Chap. I.

[2] These matters are discussed more fully below. See pp. 74-77.

CHAP. III

the furthering of the civilization and progress of the world, and thus its ends become universal in character."[1]

Classes of functions:

Approaching the subject from another angle, we may note that the functions of the state fall into three main classes, according as they are (1) both natural and necessary, or (2) natural but not necessary, or (3) neither natural nor necessary. The

1. Natural and necessary

natural and necessary—by some writers termed the *essential*—functions are such as every state must perform in order to justify its existence, or indeed, in the long run, to exist at all. They include the maintenance of a government with recognized authority, the preservation of domestic order, the protection of persons and property, resistance to external attack, defense against encroachments on the state's autonomy. Among backward peoples this is about as far as the activities of the state are likely to go; and, in general, the individualists would have the work of government carried no farther anywhere.

2. Natural but not necessary

All functions which are not essential to the internal order and external security of the state are optional; that is to say, the state may leave them unperformed without running the risk of anarchy or of extinction. But there are many which the state is peculiarly fitted to perform, which if left to private hands will be less satisfactorily performed or not performed at all, and which, according to the view of the state commonly taken nowadays, fall logically within its province. Examples that readily suggest themselves are the operation of the postal service, the maintenance of public parks and of libraries and museums, the construction of highways and of canals and irrigation works, the establishment of investigating and statistical bureaus, the protection of public health and morals, the care of the poor, provision of facilities for elementary education, and the testing of applicants for the practice of sundry trades and professions which require special and technical qualifications. These and many other activities find their justification in the promotion of the public well-being; hence they are often called the "common welfare" functions.[2]

3. Neither natural nor necessary

There are still other functions which, by general admission, are not necessary, and which most people regard as not falling naturally within the state's province. Such are the ownership and operation of railroads and telegraph lines, the manufacture and

[1] J. W. Garner, *Introduction to Political Science*, 316-317.

[2] The optional functions of the state are discussed in L. H. Holt, *Introduction to the Study of Government*, Chap. XII. Cf. W. Wilson, *The State*, Chap. XV.

distribution of gas and electricity for private consumption, the maintenance of lodging houses and pawnshops, the erection of sanitary dwellings for workingmen, and the carrying on of insurance and of banking. It must, of course, be observed that while these activities at present seem to most people to lie outside the proper sphere of the state, there is no guarantee that this will always be true. The history of government, especially in the past seventy-five years, abounds in instances in which common assent has been obtained for state activities that were formerly regarded as undesirable or quite impossible. All of the functions named, and many others of their kind, are, as a matter of fact, actually being performed by various states today, and economic and political developments which are going on under our very eyes are steadily adding to the list. As has been pointed out, the socialists and the communists would have us go much farther in this direction than any state—unless it be bolshevist Russia—has ever gone.

State functions always variable

These alleged "non-natural" functions shade off imperceptibly into the functions that all collectivists recognize as natural and necessary. And this leads to the observation that it is futile to attempt to draw a hard and fast line between legitimate and illegitimate state activities. Not only will men always be unable to agree upon the classification of many particular activities, but circumstances may make it highly desirable for one state to take up a given line of action and equally undesirable for another state to do so. Furthermore, acts and policies which are justifiable for a given state today may not be justifiable for that same state a decade, or a generation, hence. Beyond certain fundamentals, the subject is not one upon which to speak in a tone of finality. Almost the only general principle that can be laid down is that freedom should be the rule and regulation the exception, and that, therefore, the presumption should always be in favor of a policy of non-interference.

Necessity of interstate relations

Theoretically, every state is an absolutely independent unit, and all states are equal. Without sovereignty there is no state; and to be sovereign means not only to have complete control over all individuals and affairs within, but to be subject to no coercion from without. Nothing, however, is more obvious than that states cannot live in isolation. Common racial character, common language, common religion, common customs bring states into peculiarly close relationships; and even where these ties do not exist, trade, travel, and other forms of intercourse constantly tend to

CHAP. III

increase the dealings of state with state. The interstate relations which we have in mind do not cause any impairment of sovereignty. They do not extend to conquest, annexation, or other action which terminates a state's existence. But they go far toward fixing the actual conditions under which a state maintains its being, and in indirect ways they may profoundly affect the state's internal organization and character. Even the form of government in a state may be greatly influenced from abroad. Thus, France has a cabinet system of government mainly, if not entirely, as a result of imitation of English political practice.

Degrees of relationship

In the dealings of states one with another at least four degrees of relationship can be distinguished. The first is simple physical or commercial contact, without treaty agreements or diplomatic dealings. The second involves deliberate mutual arrangements—chiefly the exchange of diplomatic and consular officers and the negotiation of treaties—for the regulation and promotion of intercourse. The third takes the form of alliances, defensive or offensive, or both,—the states retaining full sovereignty and entirely separate governmental machinery. The fourth involves a still closer association in a confederation, such as that which existed in our own country between 1781 and 1789, or a personal union, such as that which bound England and Scotland together from 1603 to 1707. Members of a confederation or personal union remain sovereign states; yet they entrust certain of their governmental functions to a common congress, sovereign, or other agency.

Rise of international law

The contact of states one with another has given rise to the body of rules and usages which we call international law. Originally states lived in a "state of nature," very much as individuals are supposed by some political writers at one time to have lived. That is to say, each was a law unto itself; each habitually acted as its individual interests or impulses dictated, subject only to the restraint of agreements voluntarily made with other individual states. The result was international anarchy, from which flowed wars and a long train of other ills. Gradually, precedent and mutual convenience established certain recognized rules of action, and in modern times—notably since the Dutch jurist Grotius published his famous *De jure belli ac pacis* in 1625—an elaborate system of regulations has grown up covering the relations of states both in peace and in war. The systematization and interpretation of these regulations has been the work, mainly, of great legal writers and commentators, such as Grotius, Vattel,

Kent, Wheaton, and Hall. The regulations themselves, however, have sprung mainly from usage and from specific agreements embodied in treaties or other formal acts.

Is "international law" true law?

The question, of course, arises whether these rules are really laws. The answer depends entirely upon what we mean by law. If we understand by the term simply commands given and enforced by a determinate authority, international law is not properly law,[1] for it operates only among sovereign states, and no superior authority exists to apply the regulations as to a given situation and to compel their observance. Under this interpretation international law is, in the words of Sir Frederick Pollock, "analogous to those customs and observances in an imperfectly organized society, which have not yet fully acquired the character of law but are on the way to become law." If, on the other hand, our concept of law is sufficiently broad to embrace regulations that are deeply rooted in custom, that are normally regarded as binding, and that are supported by the great body of public opinion, then international law is actual law. The narrower Austinian idea of law is widely held, but the broader view is gradually superseding it. At all events, it must be noted that long before 1914 the most widely accepted parts of what we call international law had a substantial "sanction" in the fact that violations caused loss of prestige and were likely to bring down upon the offender the armed force of other states.

International organization

The ultimate effect of the World War was to increase men's regard for international law and to create a new desire for international organization. To a long and rapidly growing list of international unions, endowed with permanent organs of legislation and administration,[2] was added, in 1919, a League of Nations, having as its object the regulation of inter-relations among its members with a view, mainly, to preserving international peace. Elaborate machinery is provided for: a representative assembly, a smaller council, a permanent secretariat, and a number of permanent commissions; and large powers are conferred, especially for the protection of the territorial integrity and political independence of member-states.[3] The number of members, originally 18, has been

[1] Except in so far as particular states may adopt certain principles of it as part of their municipal or domestic law.

[2] P. S. Reinsch, *Public International Unions* (2nd ed., Boston, 1916). The Universal Postal Union and the Pan American Sanitary Union are examples.

[3] See the Covenant of the League, *66th Cong., 1st Sess., Sen. Doc. No. 49.* The document will be found also in *League of Nations*, II, special no. (May, 1919).

CHAP. III

brought up to 51. An objection raised against the League was that the sovereignty of member-states would be impaired; and it was partly on this ground that the United States refused to become a member. The authors of the plan had no such intention. The associated states were conceived of as entering the combination by the exercise of their sovereign wills, and in doing so they were not considered to have divested themselves of any part of their sovereign powers. Singly they could withdraw from the League, and collectively they could dissolve it as readily as they had made it. None the less, the League undeniably furnished a basis on which a future world state might be erected, and people who were opposed to any development of this kind were distrustful. Apprehension has thus far proved groundless. The sovereignty of the associated states is intact; while the future strength, and even the permanence, of the League is a matter for speculation.

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CHAPTER IV

THE BASIS AND KINDS OF GOVERNMENT

Kinds of constitutions

The principles, rules, forms, and usages which determine the structure of a government and define its powers are known as a constitution; and just as there is no state without a government, so every government rests upon a constitution, however rudimentary it may be. The term, it is true, was not used in its present sense before the seventeenth century. But this does not alter the fact that there was an Athenian constitution, a Roman constitution, a Frankish constitution; or that there is an English constitution which, in some of its parts, is as old as English civilization itself. Constitutions are, naturally, of many kinds, and can be classified in numerous ways. Considered from the point of view of the type of government for which they provide, they may be democratic, aristocratic, oligarchic, or autocratic; in form, they may be written or unwritten; as to difficulty of amendment, they may be flexible or rigid. On the basis of origin, too, they fall into three main groups: (1) those which, like the English constitution, are the product of growth through a long period of time; (2) those which, like the Prussian instrument of 1850, have been granted by a ruling prince; and (3) those which, like the constitution of the United States, have been created by the deliberate act of a sovereign people.

Different meanings of the term

We are accustomed to think of a constitution as a written instrument, a *document,* formulated and put into operation at a given moment in a people's political experience. Thus we say that the instrument which in 1789 superseded the Articles of Confederation, plus the nineteen amendments subsequently added to it, is the constitution of the United States; or that the British North America Act of 1867 is the constitution of the Dominion of Canada. This use of the term is, of course, entirely proper. None the less, there is another and broader meaning which students of government must be prepared to recognize. France before 1789, Austria before 1867, Russia before 1906, had a constitution; that is to say, in each of these states the government was organized and

CHAP. IV

public affairs were managed in accordance with a more or less definite body of principles, rules, forms, and usages. One would have searched in vain for any document or group of documents in which these rules and customs were set down. They were the product of social forces, economic conditions, royal whims and decrees, official practices; and, in the main, they had never been reduced to writing.

The English constitution

The matter can perhaps be made clearer by reference to the constitution of England. Upwards of a century ago Alexis de Tocqueville, writing on democracy in America, observed concerning the English constitution: *elle n'existe point*—"it does not exist." As a Frenchman, this author took the narrower view, indicated above, of a constitution as being necessarily a document, or at all events a small group of documents, framed and adopted at a given time by some convention or other special agency, and setting forth in logical array the framework and principles of the government operating under it. In England he could find nothing of this sort; nor can one do so today. There is, however, an English constitution, which is at once the oldest and the most influential of all constitutions known to history. This constitution is not the work of any special constituent body or power. Far from being adopted at any given time, it is a product of fifteen centuries of political growth, and much of it was never formally "adopted" at all. Some parts of it originated in solemn engagements, of the nature of Magna Carta, entered into at times of political crisis. Other parts have taken the form of statutes of such character and importance as to add to, or otherwise modify, governmental powers and procedure. Examples of the latter are the Septennial Act of 1716 and the Representation of the People Act of 1918. These compacts and organic acts exist in written form. But they are nowhere assembled in a single constitutional document.

Customs or "conventions"

Moreover, large and important portions of the English constitution have not been reduced to writing at all. Some of these arise from the common law, which is the great body of unwritten legal rules flowing from the decisions of the courts. Many more of them—termed by a leading English writer the "conventions" of the constitution—are simply understandings, practices, and habits which have gained a recognized force in the actual relations and operations of the public authorities. There is nothing in any English document to require that the king shall sign every bill

before him, that Parliament shall meet every year, that it consist of two houses and no more, that the cabinet shall n when it cannot command the support of a majority in the se of Commons, or, indeed, that there shall be a cabinet at yet upon these matters hangs the whole governmental system ie realm. In the words of Lord Bryce, the English constitution is "a mass of precedents carried in men's memories or recorded in writing, of dicta of lawyers or statesmen, of customs, usages, understandings and beliefs bearing upon the methods of government, together with a certain number of statutes, . . . nearly all of them presupposing and mixed up with precedents and customs, and all of them covered with a parasitic growth of legal decisions and political habits, apart from which the statutes would be almost unworkable, or at any rate quite different in their working from what they really are."[1]

Development of written constitutions

Of late there has been a strong tendency to reduce constitutions to written form; even in England a larger portion of the constitution is now in writing than at any earlier time, due to the increased frequency of statutes defining or altering the structure and powers of government. As the history of institutions is measured, the written constitution is, however, as yet somewhat of a novelty. The pioneer in constitution-making was America, and the earliest constitutions framed by deliberate act were those which the several states adopted, on the advice of the Continental Congress, in 1776 and succeeding years, together with the Articles of Confederation, drawn up in 1777.[2] From America the idea passed to France, and in 1791 that state received the first of the seven successive written constitutions under which it has lived during the past century and a quarter. Beginning with the Cisalpine republic in 1797, Napoleon spread his paper plans of government over all Italy and Spain, and over much of Germany, and by 1815 it was commonly considered on the continent that any political system that made pretention to liberalism must be based on a written constitution. Most European constitutional documents dating from the first half of the nineteenth century were promulgated by princely authority. But some—as the Belgian in

[1] "Flexible and Rigid Constitutions," in *Studies in History and Jurisprudence*, 134.

[2] Strict accuracy requires it to be noted that the English Civil War produced three written constitutions, and that one of them—the "Instrument of Government," drawn up by some of Cromwell's officers in 1653—was in actual operation for about three years.

CHAP. IV

1831 and the Swiss, German,[1] and French in 1848—were made and adopted by the people or by their representatives; and subsequently the tendency to a popular basis became pronounced. The German republican constitution of 1919 was framed by the most broadly representative body of the kind ever brought together.

Actual constitutions never wholly in written form

As has been pointed out, however, the whole of the actual constitution of a state is never to be found in a text or a group of texts. Sometimes the written instrument is quite obviously incomplete. This is the case in France, where the three *lois constitutionnelles* adopted by the National Assembly in 1875 not only contain no guarantees of individual liberties, but say nothing about the judicial establishment, the budget, and several other very important governmental matters. But even where the written constitution is lengthy, systematic, and detailed—as was that of the German Empire, or as is that of the Swiss republic—the formal, written instrument becomes merely the core of the constitution, around which develops a great body of statutes, customs, and forms comprising no less binding, and hardly less important, parts of the real constitution than do the formal, written provisions. One who would understand a governmental system must therefore look far beyond the written constitution under which the system is presumed to operate. The language of that instrument may, indeed, be positively misleading. Thus, from a reading of our national constitution the foreigner would certainly gather the impression that the presidential electors exercise full individual discretion in voting for candidates for the presidency and vice-presidency; whereas we know that it has become, by usage, a principle of the *actual* constitution that these electors shall automatically register the will of the voters who have chosen them to the electoral college.

The classification of constitutions as written or unwritten is worth something. But it must not be pressed too far, for all bodies of fundamental law are partly in the one form and partly in the other, and the difference among them is simply one of degree. The English constitution, reckoned as unwritten, has in many of its most important parts been reduced to written form; on the other hand, the constitution of Italy, properly classified as written, "is in reality so overlaid with custom and possesses such a high degree of flexibility that it contains more elements of true resemblance

[1] Formulated at the Frankfort convention, but never put into operation.

to the British constitution than to the constitution of the United States."[1]

Constitutions and statutes distinguished

Written constitutions are, as a rule, instruments of special sanctity, drawn up by some authority different from that which makes the ordinary laws, and alterable by a process unlike that by which these laws can be changed. The main distinction between constitutional law and statutory law is, however, one of substance rather than of form. For in many cases there is no difference of form at all. Thus in England measures that become parts of the constitution are framed and adopted by precisely the same authority, *i.e.*, Parliament, and in exactly the same manner, as ordinary statutes. There is no way of telling what parliamentary acts are to be regarded as constitutional and what as merely statutory except by reference to their content. Those that relate to the distribution and exercise of the sovereign power of the state may be set down as constitutional, and everything else as statutory.

Contents of written constitutions

Normally, a written constitution contains three main features: (1) a more or less detailed enumeration of the rights of citizens, with a view to limiting the powers of the government over the individual; (2) a somewhat extended series of provisions covering the structure of the governmental system, the powers and functions of the several governmental authorities and of the government as a whole, and the composition of the electorate; and (3) specifications as to the conditions under which, and the mode by which, the instrument can itself be amended. There are circumstances under which, and subjects on which, it may be desirable to incorporate a good deal of detail. Written constitutions which are notable for their fullness on matters ordinarily left for regulation by statute are those of Switzerland, the former German Empire and the present German republic, and certain of the newer American states, notably Oklahoma. But, so far as possible, the constitution should deal only with fundamentals; and brevity and clearness are indispensable qualities. As will be pointed out, the constitution of the United States is in these respects a very satisfactory instrument and has served as a model for constitution-makers the world over.

It has often been remarked that constitutions are not made

[1] J. W. Garner, *Introduction to Political Science*, 390. On the advantages and disadvantages of constitutions which are mainly reduced to writing see *ibid.*, pp. 392-396.

CHAP. IV

The growth of constitutions

but rather grow. This is literally true of certain constitutions, notably the English; and it is true of all in the sense that change is constantly going on. In a thoughtful essay published several years ago Lord Bryce developed as a substitute for the largely meaningless classification of constitutions as written and unwritten a new classification as flexible and rigid.[1] His idea is that a flexible constitution is one which can be modified by the same authority that makes the ordinary laws, and after the same form of procedure. The English constitution would be the best illustration. A rigid constitution, on the other hand, is one whose amendment requires the bringing into play of special constitution-making machinery and methods. The constitution of the United States affords a good example. This classification has value. Yet it, too, is subject to important limitations. For example, it would lead to the labelling of the constitution of France as rigid, for the reason that the two houses of Parliament, sitting in their respective halls in Paris, cannot adopt amendments. But the very same men, sitting in joint assembly at Versailles, have full and exclusive power to amend. Constituent and legislative proceedings admittedly differ; yet the authority is the same, the time required to get action is very brief, and in practical fact the constitution of the republic is one of the most flexible in Europe.

Flexible and rigid constitutions

The written constitutions framed in the eighteenth and earlier nineteenth centuries were, as a rule, excessively rigid. Some made no provision whatever for change; some even solemnly declared themselves immutable. Gradually, however, it came to be realized that, while stability is a virtue in a governmental system, elasticity is hardly less desirable; and while effort is still occasionally made to place certain features of fundamental law beyond the power of amendment,[2] such provisions are, after all, absolutely subject to the sovereign will of the people of the state. Ordinarily, all parts of a constitution are equally open to amendment.

Modes of constitutional growth:

Constitutions grow in four principal ways: by usage, by judicial interpretation, by statutory elaboration, and by formal amendment. Usage is, of course, the principal mode of expansion of such constitutions as have not been reduced to written form. It also con-

[1] "Flexible and Rigid Constitutions," in *Studies in History and Jurisprudence*, 124-215.

[2] Illustrations include the provision of the constitution of the United States that "no state without its consent shall be deprived of equal suffrage in the Senate" (Art. V), and the French constitutional amendment of 1884 to the effect that "the republican form of government shall not be made the subject of a proposed revision."

tributes heavily to constitutions which, like the English, are partly written and partly unwritten. Indeed, as has been pointed out, it plays no unimportant rôle in the development of constitutional systems based as largely upon a written document as is the American. Judicial interpretation arises from the practical necessity which falls upon the courts in applying constitutional provisions to say what these provisions mean and to determine their full bearings. The provisions are themselves commonly broad and general; occasionally they are actually ambiguous. They therefore admit of varied interpretations. Besides, new circumstances continually raise new questions and invite new and varying applications. Nowhere do the courts have greater power in this direction than in the United States; and nowhere do their interpretations and constructions add more to the constitution. In the language of Professor Garner, "it is almost a commonplace to say that a very large part of the constitution of the United States consists of judicial *addenda*. Almost every clause has been the subject of interpretation and construction; and if we were to strip it of the meanings that have been added by the courts during its existence of more than a century we should hardly be able to recognize it."[1] Statutory amplification is another important mode of constitutional growth. Nothing is more common than for statutes to set forth the manner in which broad and general constitutional provisions shall be applied. For example, the constitution of the United States requires members of the national House of Representatives to be chosen directly by the people in the several states; but it is acts of Congress that require their election in single-member districts, by secret ballot, and on the same day throughout the country.

1. Usage

2. Judicial interpretation

3. Statutory elaboration

Finally, constitutions may be altered by express amendment; and there is hardly a written organic law today except the Italian *Statuto* that does not provide a mode by which this can be done. As has been stated, the requisite machinery and processes may differ from or be identical with those employed in ordinary legislation. Where, as in England, they are completely identical, the sovereign electorate has consciously or unconsciously, temporarily or permanently, surrendered its natural and inherent power of constitution-making into the hands of the government; whence arises this curious situation, that the government, although theoretically only an agent with limited powers, and morally responsible to its principal, the electorate, is, in fact, entirely free to determine its

4. Formal amendment

[1] *Introduction to Political Science*, 404.

CHAP. IV

own character, organization, powers, and procedure.[1] Constituent enactments cease to be legally distinguishable from statutes; and what De Tocqueville said of the English constitution becomes true, in the sense that there is no superior law which is beyond the power of the legislature to modify or rescind. Where, as in France, constituent and legislative powers are in the same hands, although the manner of their exercise is different, the same situation obtains, except that constitutional enactments are marked off from statutes by the method of their adoption, and hence tend to acquire a superior status.

Constitutional amendment by the electorate

There are, however, states in which the power of amending the constitution is kept, largely or wholly, in the hands of the electorate, where it logically belongs. This is true in Switzerland, and in a more limited way in the German republic. And it is the plan on which Americans have proceeded, at all events in connection with their state constitutions. Except in the state of Delaware, there is no American government today, national or state, that can of its own force make any change in the formal organic law under which it operates.[2] Except in the state mentioned, the electorate (or, in the case of the national constitution, the state legislatures representing the electorates in the several states) must be directly consulted. The manner in which the electorate participates usually depends in part upon whether a general revision is contemplated, or only an amendment of certain specific features. But in one or more of the three usual stages or processes—initiation, deliberation, and ratification—the people or their representatives chosen specially for the purpose have, in all states except Delaware, an active share.

Various modes of classifying governments

In the final analysis, every state determines for itself what kind of government it will have,[3] and a great variety of forms

[1] W. F. Willoughby, *Government of Modern States*, 121. The principle is, however, gaining favor that no far-reaching changes in the governmental system ought to be made until after the people have been consulted at a general election.

[2] Even in Delaware a constitutional amendment, after being "proposed" by a two-thirds vote in both houses of the legislature, can be finally adopted only by a similar vote in the ensuing, newly-elected legislature; and the pending amendment must be given general publicity in advance of the legislative elections.

[3] For the sake of clearness, it may be reiterated that this does not mean that the people composing the state will always actually and literally decide what their form of government shall be. It means only that they have the right, *i.e.*, the legal power to do so. By assenting to, and obeying, a government which they have not themselves created they, in effect, select it as against some other government which they might, with entire legality, decide to erect in its place.

results. The difficulty is not to find bases for classification, but to decide which of the many bases that suggest themselves are most fundamental and significant. Thus, governments are often classified as hereditary and elective, although no government is entirely the one or the other; or as presidential and parliamentary, although this distinction does not go beyond the relation of the legislature to the executive. Even the familiar distinction of unitary and federal governments, while extremely important, rests only upon a difference of the distribution of governmental powers, and does not reach bed-rock.

The main basis of distinction

Upon what, then, do governments differ most fundamentally? The answer is supplied by a moment's consideration of what government is and of what it does. Government, as we have seen, is the instrument through which the state exercises those parts of its sovereign power which it wills to have exercised, yet does not desire to exercise by its own direct action. It is to exercise sovereign powers, and for this purpose alone, that government exists. But somebody must say how these powers are to be construed and applied and must see that they are carried out. Who, under any given governmental system, does this? Is it a king or other prince? Is it a special privileged class of citizens? Is it the general body of the people or their chosen representatives? It must be in one of the three, and everything depends upon which one. Here we have the point at which governments differ most profoundly; and the classification that arises is none other than the old and familiar one: autocracies, oligarchies, and popular governments, commonly termed democracies. No more scientific, or useful, classification can be made.[1]

Autocracies

In an autocracy the will of the prince is law; all political officers and organs are his agents; all acts of government are his acts. It does not, however, follow that all autocracies are alike. Two main types can be distinguished, absolute and limited. In an absolute autocracy the exercise of sovereign power is wholly despotic; that is, it is dictated solely by the momentary personal desires of the prince. In a limited autocracy, on the other hand, the prince chooses to be guided—normally, at all events—by a body of rules and customs, which may even find embodiment in a written

[1] It will be noted that the term "autocracy" is used, not the term "monarchy." The presence or absence of a monarch is not a determining factor. The English government is of the popular type, notwithstanding the survival of kingship. It is the spirit, rather than the form, that counts; although there is usually a tolerably close relation between the two.

CHAP. IV

constitution. The distinction must not be pressed too hard; for no matter how far a limited autocracy may go in the practice of liberalism, it remains an autocracy: the prince has himself, directly or indirectly, fixed the restraints under which he rules, and he is legally free to throw them off at any time. Prussia before 1850, Japan before 1867, Russia before 1906, Turkey before 1908—all were autocracies of the absolute, or despotic, type. On acquiring written constitutions in the years mentioned, each achieved a certain degree of liberalism. Yet, as the world knows, in none were the essentials of the autocratic system given up.

Oligarchies

The oligarchic type of government calls for little comment. The essence of it is the exercise of sovereign powers by a special, and usually a small, class of persons whose privilege arises from birth, wealth, reputed superior wisdom, or even a priestly function. There have been few true oligarchies in the past, and there are none of importance today. Perhaps the best example is the Venetian republic in the fourteenth and fifteenth centuries.

Popular governments

The third type of government is one in which the exercise of sovereign powers—or, rather (what legally amounts to the same thing), full and direct control over the agencies that wield these powers—rests with the general mass of the people. In the entire history of government no concept is encountered which compares in importance with this idea of popular sovereignty. In a sense, the notion is both old and new. The mighty Eastern states of antiquity—Phœnicia, Assyria, Babylonia, Egypt—were pure despotisms. The early Greek and Roman republics, however, had a popular basis, and at Rome the theory of popular sovereignty survived long after the rise of the centralized Empire had obliterated the last vestige of actual popular control. The Middle Age was dominated by the idea of autocratic power—whether of emperor, king, or pope—wielded by divine right; and only in the era of the Protestant Revolt and the English Civil War was the view again widely and convincingly expounded that the people have a right to control the governments that hold sway over them. As an alternative to the doctrine of divine right, the theory was developed that the prince's title rose from a compact between himself and his subjects, or even from a "social contract" among the people themselves whereby they agreed that they would submit to the control of a given princely government. These ideas of contract did not correspond to any ascertainable historical facts, but

they served as the levers by which the doctrine of divine right was, speaking broadly, forever dislodged from the human mind.

Growth of popular government

As a result of the revolution of 1688, England became the first great modern state to achieve a government based on the sovereignty of the people. A hundred years afterwards the principle found fresh and convincing expression in the state and national constitutions of America, and in the revolutionary constitutions of France. In the nineteenth century it continued its conquests both in Europe and outside, and in the early years of the twentieth it pressed insistently for acceptance in states, such as Russia, Turkey, China, and Japan, where autocracy still held sway. During and after the World War, it transformed political conditions in Germany, in the lands belonging to the old Dual Monarchy, in Russia, and even in Egypt and India.[1]

It is important to observe that a popular government, no less than an autocracy, may be either absolute or limited. If the ruling majority acts capriciously and arbitrarily, without restraint of law, the government is just as absolute as that of a princely despot. If, on the other hand, this majority acts only in accordance with established principles and accepted usages which protect the minority against injustice, the government becomes a limited one. In the one case we have government by *authority*; in the other, government by *law*. No tyranny is more irksome than that of a wilful majority, and popular government can be just and safe only in so far as it is grounded upon general rules of action which afford ample opportunity for deliberation and adequate protection for minorities.

Autocratic and popular government compared

We are so accustomed to the idea of popular government, and so fully in sympathy with it, that we hardly think of undertaking seriously to compare the principle of autocracy with it, in order to determine the relative advantages and disadvantages of the two. Yet such a comparison is worth while. It tends to impress the fact that in government, as in other realms of human action, few things are wholly good or wholly bad, and it sets in a truer perspective the entire movement for popular rule. The conclusions which flow from such a comparison can be stated briefly. First, an autocratic government has certain distinct advantages. There is a united will behind it. It has simplicity of structure. Its decisions are prompt and unmistakable. There is no doubt as

[1] J. Bryce, *Modern Democracies*, I, Chap. IV.

CHAP. IV

to the amount and location of authority. There is continuity of personnel and of policy. In the handling of public affairs there is a directness and a freedom of resource which become especially advantageous in the management of foreign relations and the conduct of war.

These are not mere matters of theory. For two decades before 1914 the world was accustomed to marvel at the efficiency of German government, and especially of German administration. In a very large degree, this efficiency arose from the autocratic character of the German imperial and state political systems. The administration of finance, of tariffs, of social insurance, of railways, of the postal service, was carried on through machinery that operated outside the field of influence of party politics, and largely outside the field of popular control; and—in contrast with the United States, where these and other activities are controlled by popular bodies, *i.e.*, Congress and the state legislatures—a remarkable measure of scientific precision was attained.

Advantages of autocracy only formal and technical

This, however, is only one side of the story. The advantages enumerated are, in the main, of a formal and technical nature. It is not impossible that they be attained, at least in a degree which is at present unusual, in governments of a popular type. And they are in practice largely or entirely offset by certain disadvantages which inhere in autocracy, no matter how benevolent the autocrat may be. Government is not a mere matter of cold-blooded, efficient collection of taxes, trying of cases, and enforcing of laws. To achieve its full purpose, it must cultivate the aptitudes and aspirations of the people and give the fullest possible opportunity for their expression. It has a broad human, social, moral function. The fundamental objection to autocracy is that it means government whose will, impulse, and purpose lie outside of the people governed; indeed, its interests and aims are not unlikely to run sharply counter to those of the masses. The prince does not owe his position to the people; he regards himself as the personification of the state; the people are mere subjects; as against his authority they have no rights; the officers are his bureaucrats, not the servants of the community; the laws are his decrees, not expressions of the public will; where there are elective assemblies or other popular agencies, they exist by sufferance of the prince, and their activities are restricted by him as he may choose; the army is a royal tool, not the people's guardian, and militarism almost inevitably becomes the accompaniment of

bureaucracy. Under these arrangements, government can hardly be otherwise than arbitrary, oppressive, and unjust; and the modern world, or most of it, has said that it will have no more of them. The mechanical advantages of autocracy are outweighed by its moral shortcomings; and the thing which peoples nowadays must do is to find a way of attaining these advantages under governmental systems based upon principles of liberalism. Movements for efficiency in popular government have already gone far enough to show that the old notion that the best government is a benevolent absolutism is a fallacy.[1]

Democratic *v.* representative government

Popular government, however, is not always and everywhere the same thing. The essential feature of it is control by the people over the exercise of the powers of sovereignty. But there are at least two principal ways in which this control can be wielded. The first is by keeping the management of affairs actually in the hands of the people themselves, so that the citizens in the mass make the laws, levy the taxes, decide questions of war and peace, determine all other matters of policy, and select and supervise the officials who carry on those parts of the public business which are of such a nature as to require personal and continuous attention. The alternative to this is the plan of entrusting law-making, determination of policy, and the appointment and supervision of most of the officials to persons chosen by the citizens to exercise these functions in their behalf. According as the one plan or the other is followed, the government becomes (a) democratic or (b) representative.[2]

Disadvantages of direct government, *i.e.*, democracy

Theoretically, democracy, as above defined, is the most perfect of all forms of government; for under it the powers of sovereignty not only are possessed by the people but are actually exercised by them. A moment's reflection, however, will suggest several practical difficulties. In the first place, the system makes large demands upon the citizen's time and energy; he must at all times be prepared to turn aside from his individual pursuits to discharge his duties as legislator, administrator, judge. In the second place, the system assumes that the ordinary citizen is qualified to decide wisely what laws ought to be made and what policies

[1] J. Bryce, *Modern Democracies*, II, Chap. LXXIV, on "Democracy Compared with Other Forms of Government."

[2] The term *democracy*, meaning "the rule of the many," is ordinarily used to describe any political system of a popular nature, irrespective of whether the people govern directly or through representatives. It is important, however, to understand the word's narrower and more exact meaning as well.

CHAP. IV

ought to be pursued. But we know that very often even the most experienced public men can reach such decisions only after extended, and perhaps highly technical, investigations. Still other obstacles suggest themselves: the delay involved in bringing the people together for governmental action; the unfitness of a vast popular concourse to transact business in a sober and orderly manner; and, most obvious of all, the physical impossibility of operating the plan in a state of considerable size. So weighty are these difficulties that the world has known few direct democracies. Certain of the Greek states were organized on this plan; but they were very small, and only a limited section of their populations was conceived of as belonging to the body politic. Many of the Swiss cantons were once governed in this way; but representative councils have now superseded the *Landsgemeinden,* or primary assemblies, in all except four.[1] The New England towns have, in general, belonged in the same category; but they are small subordinate areas, not states; besides they, too, are gradually going over to the representative system.

Rise of the representative principle

The assertion will hardly be challenged that the greatest discovery ever made in the field of human government is the representative principle; for without that principle popular government in large states could not exist. The ancient world was unacquainted with the representative idea; government was either democracy within a petty city-state or autocracy over a broad expanse of territory. The idea originated in the Middle Ages and found its first practical applications in arrangements made by the Norman and Angevin kings of England for the assessment of taxes and the administration of justice. In the thirteenth century it became the basis for the organization of the English Parliament, and thereafter it was turned to use in the Estates General of France, the Cortes of Spain, and many other national and local bodies. The original conception was that representatives were the spokesmen of their respective "estates," cities, or other constituencies, selected to sit and deliberate with similar spokesmen of other distinct interests. As early as the sixteenth century, however, the view arose in England that the members of Parliament were representatives of the people at large, rather than of particular classes; and after the French Revolution this notion of national,

[1] More exactly stated, the cantons of Uri and Glarus, the two half-cantons of Unterwalden, and the two half-cantons of Appenzell—in all, six governmental areas.

as opposed to class, representation gradually won acceptance on the continent. Many constitutions and electoral laws nowadays specify that members of the national legislature, after being elected in the various constituencies, shall be regarded as representatives of the whole people.

Advantages of the representative system

As a practical plan of political organization, the representative system has large and obvious advantages over simple democracy. Without taking ultimate control from the people, it puts the actual work of government in the hands of persons specially chosen for the purpose—persons who can be paid to give their attention to it undividedly, and who can be expected either to possess from the outset or to acquire the special knowledge and skill requisite to give the best results. The system obviates the necessity of bringing the people together in unwieldy assemblages. It interposes a check upon the action of impulsive majorities. Above all, it opens the way for the development of popular government in any state whatsoever, regardless of extent or population. During the past hundred years it has spread round the world—to the English and French colonies, to Latin America, to Japan, China, India, Persia.

The principle is, however, applied in widely varying ways. Especially are there differences in the basis and breadth of representation and in the literalness and fullness with which the idea is carried out. Thus, in England the principle is made use of quite without reserve; the people entrust the most sweeping powers—constituent, legislative, and financial—entirely to Parliament. In the United States the plan does not preclude arrangements under which the people retain, through their party organizations and the use of the initiative, referendum, and recall, a considerable amount of direct and independent control. After all allowances are made, the fact remains, however, that popular government has come to mean, to all intents and purposes, representative government, and that in the spread and perfection of the representative system lies the world's chief hope of political advancement.

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CHAPTER V

THE DISTRIBUTION OF GOVERNMENTAL POWERS

When a new state comes into existence or an old one reconstructs its political system, certain fundamental questions have to be met and answered. With what powers shall the government be endowed? Who shall have ultimate control over the exercise of these powers? What machinery shall be employed, and on what lines shall the public powers and functions be parcelled out among the several parts of the governmental mechanism? We have seen something of the experience of states in meeting the first question, and of the contrasted political forms that arise from different answers to the second. It remains to take note of the purely structural arrangements through which the ends of political organization may be attained.

Territorial and functional distribution

Except in a very small state, the powers of government are so numerous, complicated, and weighty that they can be carried out only by being entrusted to many different hands. Obviously, this distribution will mainly determine the form which the apparatus of government is to take. There are two ways in which it can be made. The state may be divided into one or more sets of districts, and to each district, equipped with the requisite machinery, may be assigned the exercise of certain powers. This is, of course, a *territorial* distribution. Or the division may be in accordance with the nature of the authority exercised, in which case it is *functional*. It must not be inferred that use of either method precludes use of the other; on the contrary, in practically all states governmental powers are distributed at the same time in both ways. But the character of a government as a practical working system depends very much upon whether emphasis is placed upon the one principle of distribution or upon the other.

Nature of territorial distribution

It must be observed that not every parcelling out of government work by districts or other divisions constitutes a territorial distribution in the sense here meant. For example, the collection of the customs duties, the administration of the immigration laws, the management of the postal service, is carried on in the United

CHAP. V

States and other countries in customs, immigration, and postal districts. But these divisions exist only for administrative convenience; by its very nature the work to be done must be performed locally all over the land rather than at the capital. In all such districts the authority of the central government is exercised in a uniform manner by persons who are officers, not of the district, but of the central government. There is no real division of powers at all.

Purposes

What we have in mind when we speak of a territorial distribution is, rather, units that are political, not merely administrative; that is, divisions to which are assigned considerable aggregates of governmental power, to be exercised largely or wholly at the discretion of the division (and therefore not uniformly) and through governmental organs which belong to it rather than to the central government. Such divisions are the states, counties, cities, and towns of the United States; the counties, boroughs, and urban and rural districts of England; the departments, arrondissements, and communes of France; the cantons of Switzerland. The reasons for turning over governmental power to subdivisions of these kinds are not far to seek. One object is to relieve the central government of an intolerable burden of work and responsibility. But the main consideration is that many of the tasks of government relate exclusively to particular sections of the country, which can be made to assume immediate responsibility for them, and can see that they are exercised in accordance with variations of local conditions and needs. It is inherently just that separate communities should have control over their own affairs in so far as the interests of other communities or of the state as a whole are not adversely affected; and it may reasonably be expected that such regulation will be wiser and more effective than if exercised by a distinct, overworked central government.

Two modes of territorial distribution

The actual structure of a governmental system is determined in no small degree by the method employed in making this territorial distribution of powers. There are two ways in which it can be done. A scheme of distribution, stipulating what the divisional areas of government shall be and what functions they shall have, may be incorporated in the constitution. In this case the distribution is made by the political sovereign, and the resulting governmental agencies, central and local, are coördinate in the sense that both derive their authority from direct grant of the sovereign and neither can encroach upon the field occupied by the

other unless the sovereign assents. On the other hand, the constitution may go no farther than to create a single organization, endowed with full governmental powers, to which is left the task of providing for such territorial distribution as may be found desirable.

Federal and unitary governments

According as the one plan or the other is followed, the resulting form of government is federal or unitary. The distinction arises not from the mere fact of a territorial distribution of powers, for there is such a distribution in all modern governments, nor yet from the amount or kinds of power delegated to the local areas, but from the authority by which the distribution is made. To be concrete, the government of the United States is federal, because the sovereign people have provided in the constitution equally for the central, national government and for the governments of the principal divisional areas, *i.e.*, the states; it is not at all for the central, national agencies to say what powers or what organization the states shall have. On the other hand, the government of France is unitary, because there is but a single, integral government, with its seat at Paris, a government which has created the departments, arrondissements, and other local political areas for its own purposes, and which is free to alter these subordinate districts in their organization and powers at any time, or even to abolish them altogether.

Few subjects have evoked more lively discussion among political scientists than the relative merits of these two forms of governmental organization. The federal system has won high praise from Montesquieu, De Tocqueville, Sidgwick, Bryce, and many other authorities; some writers have gone so far as to pronounce it the best possible basis of human government. Its advantages have been admirably summed up by an American writer as follows:

Advantages of the federal system

"It affords a means of uniting into a powerful state commonwealths more or less diverse in character and having dissimilar institutions, without extinguishing wholly their separate existences. It furnishes the means of maintaining an equilibrium of centrifugal and centripetal forces in a state of widely different tendencies . . . It excels all other forms of government in the effectiveness with which it combines the advantages of national unity and power with those of local autonomy. It secures at the same time all the advantages of uniformity in the regulation of affairs of general concern with those of diversity in the regulation of local affairs. Instead of concentrating the powers of the state in

a single organ or set of organs, as in the case of the unitary state, federalism distributes it between a common central government and a number of local governments, and thus prevents the rise of a single despotism absorbing all political power and menacing the liberties of the people. By securing the advantages of self-government for the people in those affairs which are peculiarly local to them, it reconciles them to the loss of power which they have sustained through the surrender of their control over other affairs to the general government. Furthermore, through the right of local self-government, the interest of the people in local affairs is stimulated and preserved, they are educated in their civic duties, and this in turn reacts upon the character of the local administration. Federalism, observes Bryce, allows experiments in local legislation and administration which could not safely be tried in a large country having a unitary system of government.[1] At the same time it supplies the best means of developing a new and vast country by allowing the particular localities to develop their special needs in the way they think best."[2]

Federalism sometimes the only practicable form

All of these considerations have weight. None the less the federal plan has serious defects, and some authorities refuse to recognize it as more than a makeshift resorted to as a means of attaining a modicum of union when circumstances preclude the establishment of a fully unified governmental system. It is a well-known fact that the United States set up the federal form of government, not because the framers of the constitution coolly weighed the advantages of the federal and unitary forms and chose the federal form as being the better, but because the states then existing could not possibly have been induced to make such a surrender of powers as the establishment of a unitary government would have required. Federalism in Canada, Australia, Germany, and Switzerland is of similar origin; and if in certain of the Latin American states—Brazil, Argentina, and Mexico—it represents a deliberate choice, this choice sprang rather from a natural tendency to imitate the United States than from an open-minded study of the alternative systems.

In actual operation the federal plan reveals a number of defects. First, it is very complex. There are as many different

[1] A good illustration is the socialistic innovations introduced in North Dakota in 1918-19, at a time when radical sentiment was ascendant in that state.

[2] J. W. Garner, *Introduction to Political Science*, 230-231. Cf. J. Bryce, *American Commonwealth*, I, Chap. XXVIII.

...ials as there are government areas, with the result of overlapping, confusion, and waste. Second, there is a lack of unity. These sets of officials are coördinate in status; they will not take orders one from another; they are apt to work at cross purposes; they occasionally fall into actual conflict. This division of effort and of responsibility works out disadvantageously both in foreign and in domestic affairs. The United States has been repeatedly embarrassed in its efforts to enforce treaty obligations by legislation enacted by individual states in pursuance of their reserved powers over the rights of person and property. And much of our political and economic history turns on the difficulty of securing adequate and uniform regulation of railway rates and services, labor, industrial corporations, taxation, conservation of resources, insurance, marriage and divorce, under a governmental system that divides the power of control among more than two score practically independent authorities.

Third, the federal plan is apt to prove excessively rigid. The jurisdictions of the central government and of the several state governments are defined in the constitution; and the constitution of a federally organized state is likely to be difficult to amend, for the reason that, as a rule, the favorable action of a substantial majority of the federated divisions must be obtained. Social and economic changes, however, come so rapidly under modern conditions, and create such novel and critical problems, that promptness and freedom of governmental action are highly desirable. A unitary government, being in full command of the field, can proceed at any time to whatever legislative and administrative readjustments are deemed necessary. Probably no constitutional amendment will be required; but if it is, it can usually be adopted expeditiously. On the other hand, a federal government is likely to be obliged to wait until conditions have become almost intolerable before a new grant of authority is forthcoming, if indeed it is obtained at all.

Finally, it is to be observed that whereas it is commonly said that the federal system is the more favorable to local self-government, there is no essential reason why this should be so. As a matter of fact, in a number of instances it is not the case. Thus in England, where the unitary type of government prevails, the local community enjoys almost, it not quite, as much control over its own affairs as does the local community in most parts of the United States. Although based on a centralization of authority,

CHAP. a unitary government may decentralize the actual exercise of this authority to any extent that it finds desirable.

Tendencies away from federalism

Herein we have some of the reasons why federal government is not now as highly regarded as formerly. It is significant that when, in 1909-10, the British colonies in South Africa drew together under a common government they decided, after mature deliberation, to set up a unitary rather than a federal system, although the situation was one which quite as naturally suggested a federation as did that in Canada in 1867 or that in Australia in 1900. Similarly, republican China in 1911 chose the unitary type, although the country's autonomous provinces and districts formed the natural basis for a federal government. In both of these cases the difficulties encountered by the United States in operating its federal system were partly responsible for the decision reached.[1] A farther evidence of increasing appreciation of the advantages of the unitary type is the universal tendency in federal-governed states to exalt the central government at the expense of the divisional governments by increases of power, both through formal constitutional amendments and through interpretation and usage.[2]

Division of powers functionally

Whatever its structure, a government has varied functions and wields powers of different kinds. More than two thousand years ago Aristotle developed the idea that a government should contain three organs, one "deliberative" (or legislative), another executive, and a third judicial.[3] The concept was only partially worked out, and during mediæval and early modern times it was largely lost to view. Near the close of the seventeenth century, however, the English philosopher Locke made the "separation of powers" a cardinal feature of his system;[4] Montesquieu, in France, put great stress upon it a half-century later;[5] during the American and French revolutions it gained wide currency; and it has continued

[1] W. F. Willoughby, *Government of Modern States*, 204.

[2] For this development in the United States see Chap. XVI.

[3] *Politics*, Bk. IV, Chap. XIV.

[4] *Two Treatises of Government*, 143-148, 156, 159.

[5] In his *De L'esprit des Lois* (Bk. XI, Chaps. IV-VI) we read: "Political liberty is to be found only in moderate governments; even in these it is not always found. It is there only when there is no abuse of power. . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. . . . In every government there are three sorts of power: the legislative, the executive . . . and the judicial power. . . . When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty if the judicial power be not separated from the legislative and executive."

to this day a universally familiar and an exceptionally important political principle. The three-fold classification which Aristotle suggested, *i.e.*, legislative, executive, and judicial, still finds most general favor; and it will be employed for purposes of this book. It should be noted, however, that certain contemporary French and American writers follow Thomas Paine, and even Montesquieu himself, in holding that the judiciary is not in its essence distinct from, but is merely one aspect of, the executive power;[1] also that a recent American writer has developed an ingenious, although not wholly convincing, classification which adds to the traditional three functions two others, *i.e.*, electoral and administrative.[2]

Three main functions

The legislative function is, obviously, that of ascertaining and expressing the will of the state in the form of laws. The judicial function is, in the main, that of hearing and deciding disputes which arise out of the enforcement of these laws. The executive function is that of representing the government as a whole (especially in its dealings with other governments) and of seeing that the laws are duly enforced. If an administrative function is to be distinguished from the others—and there are good reasons for doing so—it is that of actually carrying out the provisions of the laws as declared by the legislature and interpreted by the judiciary, the executive function involving supreme oversight and the exercise of considerable policy-determining power, while the administrative function comprises, rather, the detailed, continuous, and largely routine business of law enforcement at first hand. There is, however, no sharp line of demarcation between the two.

Reasons for functional distribution

This differentiation of governmental actions affords the basis for the second principal mode of distributing governmental powers, namely, in accordance with function. Nothing is more natural than to put the exercise of different kinds of power in the hands of different organs of government, and in every government there is a certain amount of such distribution, just as there is of necessity a certain amount of distribution on a geographical basis. One reason for a functional distribution is practical convenience. The tasks of government are so numerous and onerous that they must be divided among many hands. A second object is the security of the public interests. No single governmental organ or group of organs, it is urged, should be endowed with so

[1] Duguit *La séparation des pouvoirs*, 73-74; F. J. Goodnow, *Principles of Administrative Law*, 17-19.

[2] W. F. Willoughby, *Government of Modern States*, Chap. XI.

CHAP. V

much power that it can become tyrannical; powers must be distributed among various agencies, which can be set to watch and check each other.

Functional distribution in America

Both of these considerations weighed with the makers of our American constitutions. Acting in the light of their own experience, and strongly influenced by the thought of Locke, Montesquieu, and other European writers on government, they worked out both state and national governmental systems whose basic principle was, and still is, the separation of executive, legislative, and judicial powers. The authors of these new organic laws had no desire, however, to put any branch of government in a position of such independence that it could usurp authority or disturb the equilibrium. Hence they interposed a series of checks and balances which caused the executive branch to become partly legislative and the legislative branch partly executive; while they made no provision for an administrative branch at all. The curious consequence is that, although legally governments of separated powers, the governments of the United States and the several states in reality operate rather less in accordance with that principle than do certain foreign governments, notably the English, which are legally organized on the plan of "union of powers" rather than that of separation.

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CHAPTER VI

THE STRUCTURE OF GOVERNMENT

Structure of government influenced by distribution of powers

The machinery employed in carrying on the work of a government is partly determined by the manner in which governmental powers are distributed geographically; a government organized on a federal basis presupposes mechanical arrangements different from those required under a unitary system. But the structure of a government is influenced in an equally important way—indeed, rather more fundamentally—by the distribution of powers functionally. Among the first questions that arise when one starts to inquire into the governmental system of any country are: Where are the powers of legislation vested? What is the form of the executive? What provision is made for a judiciary? What are the agencies of administration?

Having observed, in the preceding chapter, certain general facts about the functional distribution of powers, we are prepared to note the salient features of the three or four main agencies, or "branches," among which the functions of a well-ordered modern government are divided.

The legislature the fundamental branch

The most important of the main, and generally recognized, branches of government is the legislature. This would be true if the legislature were only, as the name implies, a law-making body. In point of fact, however, a legislature is always something more than an agency to make laws; and in governments—for example, that of the United States—in which the principle of separation of powers is but partially applied, the law-making power is accompanied with functions of so many other kinds that the term "legislative branch" becomes, in a sense, a misnomer.[1] The most common functions of legislatures are three: constituent, representative, and legislative. Speaking broadly, the power to frame and adopt constitutions rests with the people, or more accurately the electorate. Legislatures, however, commonly have much to do with the process, especially with constitutional revision. Thus in the United States no change can be made in the national

Functions of legislatures:

[1] See p. 395.

CHAP. VI

constitution without preliminary action by Congress. Most written European constitutions are amended exclusively by legislatures, usually under a form of procedure somewhat different from that followed in the enactment of statutes. In Great Britain, as has been pointed out, the national legislature, Parliament, exercises full constituent powers and the electorate does not directly participate in constitution-making at all.[1] The second function enumerated, *i.e.*, the representative, is that of serving as an organ of public opinion. The object of popular institutions of government is to provide means by which the majority will of the electorate can be ascertained and given effect. There are various avenues through which public opinion can find expression. The press is one. Political parties form another. As a rule, however, the only agency through which the public will can bring things to pass is the government—which means, mainly, the elective, representative legislature.

1. Constituent

2. Representative

3. Legislative

The third function is legislation proper. It would surprise the inexperienced inquirer to learn how large a part of the law operating in Great Britain, the United States, and other countries was never created by any act of formal legislation; also, how small a proportion of the measures that emanate from such legislative bodies as our Congress and our state legislatures are, properly speaking, laws. Much law arises from custom and from judicial decisions; most so-called legislative acts, at all events in America, relate nowadays to details of administration, and, being particular rather than general, temporary rather than permanent, are not laws but mere administrative orders. Of true legislation, however, there is, of course, a considerable amount; and while in steadily increasing degree, especially in the English-speaking and cabinet-governed countries, the initiative lies with the executive and administrative authorities, the ultimate power and responsibility of decision rests with the legislative branch.[2]

Questions of structure

In structure, as in function, legislatures vary widely. Inasmuch as it is peculiarly the legislature's province to voice and give effect

[1] See p. 41.

[2] Other occasional functions of legislative bodies include: (1) electoral, *e.g.*, the choice of president and vice-president by the American House of Representatives and Senate respectively in case the electoral college fails to elect; (2) judicial, *e.g.*, the handling of impeachment cases in the United States and in France; (3) service as an executive council, *e.g.*, in relation to appointments and treaties in the United States; and (4) action as a "board of directors" in the management of the administrative officers and their work, *e.g.*, the control over administration exercised by the American Congress. See W. F. Willoughby, *Government of Modern States*, Chap. XIII *passim*.

to the public will, a question that must be given the most careful consideration by constitution-makers is, What kind of a legislative branch will insure the fullest and truest representation of the people as a whole consistent with deliberate, expeditious, and honest performance of the work in hand? The general question resolves itself into several particular queries. Shall the legislature be organized in one house or in two houses? How large shall the membership be? How shall the members be apportioned? How shall they be elected? What shall be their qualifications? How long shall they serve without re-election? How much, if anything, shall they be paid? How shall the chamber, or chambers, be organized for work?

Commonest structural arrangements

The wide variations of practice in these matters cannot be described here, even in summary. The arrangements existing in the United States, in both national and state governments, will be duly considered in later chapters, and comparisons will be made with arrangements in other countries.[1] Suffice it to say that, throughout the civilized world, it is the common practice at the present day to construct legislatures on the bicameral principle, *i.e.*, in two chambers or houses; that it is recognized as very desirable that the two houses be so composed that they will not be duplicates one of the other; that, while the composition of upper chambers is dominated by no single principle, lower chambers are invariably made up of representatives chosen by the electorate; that through the broadening of the suffrage the lower branch has steadily become more truly popular; that, largely on this account, most legislative bodies have increased in size to the point of unwieldiness; that members of the lower house are most frequently chosen in single-member constituencies; that property, religious, and other special qualifications for election have been so diminished that practically all voters are eligible; that payment of salaries to members, once unusual, has in the present century become the rule; that legislatures are elected for fixed terms, yet in many countries are subject to dissolution at any time by decision of the executive authority; and, finally, that with few exceptions the form of organization of legislative bodies for the carrying on of their work is left to be determined by each chamber for itself.

The executive branch: chief functions

The newer tendency to recognize an administrative branch of government as distinct from the executive branch has at least the advantage of reducing the executive to very simple scope and

[1] See Chaps. XXIII, XXXV.

CHAP. VI

form. So considered, the executive functions are, while highly important, few in number and substantially the same in all governments; and for their performance hardly any organs or agencies are required beyond the single office of chief executive. The necessary and usual executive functions may be enumerated as follows: (1) to represent the state, as titular head, in its dealings with other states; (2) to appoint to and remove from important civil and military offices; (3) to exercise supreme command of the armed forces; (4) to grant pardons and reprieves; and (5) to see that the laws of the land are fully and impartially enforced. It almost invariably happens that the chief executive does other things besides these; indeed, the last-mentioned function obviously involves powers of inspection and direction which bring the executive into vital relation with administration. Of purely executive functions, however, there are hardly any others.

Single and plural executives

The main questions that arise, therefore, when the framers of a constitution take up the executive branch are: Shall the chief executive be single or plural? What shall be the basis and period of tenure? And what relations shall be sustained with the other branches of the government? In general, the single executive has commended itself as preferable to the plural. It is to be observed, however, that in England and other cabinet-governed countries, while there is an individual (king or president) who is titular executive, the actual, working executive is, rather, the group of persons forming the cabinet; also that Switzerland, while having a president, has as its actual executive a "federal council," composed of seven members, among whom the president is only *primus inter pares*.

Hereditary and elective executives

There are two bases upon which executive tenure may rest—hereditary and elective. The hereditary type of executive is not without advantages. It makes for continuity and unity in the execution of public policy; it tends to bring to the office a succession of persons specially trained for it; it obviates disturbing, and sometimes tumultuous, elections. On the other hand, there is the grave disadvantage that there can be no guarantee that the hereditary executive will be competent; and since, furthermore, an hereditary executive necessarily involves a monarchical form of government, the type can no longer be expected to meet with much favor, except, at all events, where the monarch is, as in England, only the nominal, not the real, executive.

For the election of chief magistrates three main plans have been devised, according as the choice is made by the popular elec-

torate, by the legislature, or by a special electoral college. As a matter of law, the first plan is now hardly found outside of the German republic and the Latin American countries. France tried it in 1848, but with disagreeable results,[1] and the view is widely held, not only that the people as a whole cannot be trusted to make a wise choice, but that popular election opens the door for dictatorships and other abuses. The second plan, namely, election by the legislature, prevails today in France, in Switzerland, and in a few other countries. The third, *i.e.*, choice by a select body of "electors," themselves chosen by the people, is, in form, the method employed in the United States, although the unanticipated development of party machinery and discipline has brought it about that our presidential electors merely register the will of the voters who have chosen them, so that for all practical purposes the plan of popular election prevails.[2]

Modes of electing the executive

The relations existing between the executive and the other branches of government involve numerous questions that cannot be taken up here. Fundamentally, they hinge on the distinction between "presidential government" and "cabinet government." In a presidential government the chief executive derives his powers directly from, and is immediately responsible to, the electorate. He is not chosen by the legislature; he holds his office for a fixed term, regardless of whether his relations with the legislature are or are not harmonious; he stands on a common footing with the legislature, and in most of his acts cannot be controlled by it. Such is the system which we have in the United States. On the other hand, in a cabinet government the actual, working executive, *i.e.*, the cabinet, while not elected by the legislature, is composed of persons who are members of that body, who are indeed its leaders, who retain office only so long as they can collectively command the legislature's support (at all events, the support of the majority in the lower house), who accordingly form a sort of executive committee of that body and are immediately responsible to it, rather than to the electorate, for all of their acts. This is the type of executive found, with some variations, in England, France,[3] Belgium, Italy, and several other European countries.

"Presidential" *v.* "cabinet" government

[1] By deft use of the "plébiscite" Louis Napoleon first secured election as president of the Second Republic and later obtained an endorsement of the *coup d'état* by which he converted the country into an empire.

[2] See p. 234.

[3] France, indeed, has a president; but her governmental system is of the cabinet type. F. A. Ogg, *Governments of Europe* (rev. ed.), Chap. XXII.

CHAP. VI

It is obvious that the presidential system is based on the principle of separation of powers, both organically and personally; although, as is true in the United States, the executive and legislative branches may retain authority to check one another at important points. Under a cabinet system there may be also, as there is in England, full recognition of the distinction between executive and legislative functions. Functions of both kinds are, however, entrusted to the same hands; and relations between the two branches of government become exceedingly close. The cabinet system has the obvious advantage of unity, and also responsiveness to the public will, since in the event of serious disagreement a parliamentary dissolution, followed by a general election, takes place without the necessity of awaiting the expiration of anybody's "term." The relative desirability of the two types is, however, not a matter for generalization, but is rather a question to be answered entirely with reference to the conditions existing in the particular case.

Machinery of administration

A principal function of the executive branch is, as has been stated, to see that the laws are duly enforced. Distinguishable from this function is the work of actually enforcing these laws and of carrying on, in general, the routine business of the government, —in other words, what we call administration. It is not yet customary to maintain a distinct branch of government for administrative purposes. None the less, there is a tendency toward this policy, notably in France, Italy, and other European countries; and the Latin American republic of Uruguay, in a new constitution adopted in 1917, has deliberately withdrawn the administration of internal affairs from the executive and has vested it in a separate national council of administration. Without implying that a real administrative "branch" is to be found in all governments, we may none the less make a place for such a feature in our outline of governmental machinery. Even where, as in the United States, no clear line can be drawn between executive and administrative functions and agencies, a broad distinction can still be perceived.

Problems of administration: 1. Organization

The problems presented by the administrative part of a government have been arranged by a leading American student of administration in four groups, according as they relate to organization, personnel, *matériel* (or equipment), and practice and procedure.[1] The foremost question of organization is whether the long and growing list of distinct administrative services—tax collection, bank

[1] W. F. Willoughby, *Government of Modern States*, 391.

inspection, forestry, immigration, the post-office, public health, and what not—shall be organized on an essentially independent and coördinate basis or whether they shall be grouped in a few main departments. In general, our states have followed the former plan, and our national government the latter. Another question of organization is whether there shall be set up some central coördinating and controlling agency, such as the Treasury Department in England, or the new Budget Bureau in the United States. Problems of personnel are yet more numerous and important. How shall the officers and employees in the several services be recruited? Shall they be subjected to competitive tests, and if so, of what nature? What opportunities shall be offered them for promotion? How shall their efficiency be measured and recorded? How shall they be instructed and disciplined? Under what conditions shall they be retired? "No amount of care," observes Willoughby, "in determining how a government shall be organized for the performance of its work, the particular practices and procedure that shall be employed by it, and the manner in which the funds necessary for its support shall be raised and expended, will give even a measurable approach to efficiency in the actual administration of public affairs unless a technically competent personnel can be secured and retained in the service and a system is devised whereby this personnel may be effectively directed and controlled."[1]

2. Personnel

The conduct of the public business requires the maintenance and upkeep of gigantic physical plants and the purchase and distribution of vast quantities of supplies. This raises still another important group of problems—the problems of *matériel* or equipment. Shall government property be cared for and equipment be procured by the men who are engaged in administration proper or by specially organized "supply services"? Shall each branch of administration have its own supply service, or shall the purchasing and handling of materials be carried on through a central supply department? To what extent shall the government manufacture its own equipment? Finally, there are the problems of business practice and procedure—the preparation of reports, the keeping of records, the filing of correspondence, and, above all, accounting and auditing—which can no more be neglected by an orderly and efficient government than by a well-managed bank, mercantile house, or other private establishment.

3. Equipment

4. Procedure

A highly important branch of every completely developed gov-

[1] *Government of Modern States*, 397.

CHAP. VI

The judicial branch

ernmental system is the judiciary. In a general way, it may be said that the function of the courts is to hear and decide disputes, whether between individuals, or between individuals and corporations or other groups, or between individuals or corporations and the state as represented in the government. This work of deciding disputes involves, or may involve, far more than appears on the surface. First, the facts in any given controversy must be determined. Speaking broadly, the court does not seek out the facts for itself. It leaves this to the parties to the case, who, ordinarily through attorneys, bring forward witnesses and in other ways seek to get before the court a body of evidence showing that the facts are as they, the respective parties, contend. Next, the law must be applied to the facts as ascertained. The result is a judgment in favor of one of the contestants—a decision which, it should be emphasized, must be determined, not by the court's feeling as to what would be the ideal disposition of the case, but in strict accord with the law upon the given subject.

The function of declaring the law

Suppose, however, there is doubt as to what the law is, or that the case presents features that are not clearly covered in the law, or that two or more laws emanating from different authorities are in conflict upon the subject. The court must decide; and here is where the most important function of courts arises, namely, the duty of determining what the law is, what its scope and meaning are, and, when there is a conflict between provisions in the same law or between different laws, which shall prevail. A decision of this sort, once made, is likely to have great weight on later occasions and with other tribunals; and it is easily possible to hold, as many jurists do, that the courts in effect "make" law, even in a country such as our own in which the principle of separation of powers nominally obtains. Nowhere, indeed, as will be explained, has this power of the courts to declare the law been carried to greater lengths than in the United States.[1]

The hierarchy of courts

Structurally, the judicial branch of a government consists of tribunals known as courts, composed of one or more judges, equipped with the requisite staff of clerks and other subordinates, and all more or less closely articulated in a single system. There must, in the nature of things, be tribunals of different grades or ranks. To take care of petty cases, and to bring the agencies of justice within the easy access of all, inferior courts, with limited jurisdictions, must be set up in the local communities. Superior

[1] See Chap. xxxi.

courts, for the trial of cases of serious crime or involving important controversies, must also be provided; and it is both customary and desirable to arrange that decisions in the lower courts may, on appeal, be reviewed in the higher ones, in order that errors may be corrected and that greater uniformity in the application of the law may be attained. Most states, furthermore, have a supreme court, with broad and final appellate jurisdiction, and usually with original jurisdiction in certain kinds of cases.

Different sets of courts

A question that inevitably arises when a judicial system is to be created is, Shall one set of courts be established to handle all classes of cases, or shall different sets be provided for different classes? The nearest approach to a single set of tribunals for the handling of all kinds of cases is in England, where an older and complicated judicial system was much simplified by legislation of some fifty years ago. On the other hand, France, Germany, and other continental countries maintain a set of "ordinary" courts for the handling of cases that do not involve the validity of governmental actions and a separate set of "administrative" courts for the consideration of cases between individuals and administrative officials of the government; although each of these systems is highly integrated and is exclusive within its field. The tendency in the United States has been toward a considerable degree of differentiation. We have civil courts and criminal courts, courts of equity and courts of common law, probate courts, admiralty courts, domestic relations and divorce courts, morals courts. When it is observed, further, that the United States, on account of the federal character of its government, is practically compelled to have two entirely separate sets of tribunals, one national and the other state—indeed, one national system and forty-eight state systems, taking no account of the territorial courts—it hardly needs to be remarked that our judicial organization is exceptionally, if not excessively, complex.[1]

Judicial independence

The one indispensable condition of a satisfactory judiciary is independence. In the last analysis, the agency to which the individual must look for the vindication of his rights, both as against other individuals and against the government, is the courts. Similarly, it is upon the courts that all minorities must be dependent for protection against the dominant authority in public affairs, whether that authority be an autocratic prince or an overbearing popular majority. The courts must see that the executive does

[1] See Chaps. XXXI, XLI.

CHAP. VI

not exceed its constitutional powers, that the legislature, similarly, is kept within bounds, that all rights and liberties guaranteed by organic or statutory law are enjoyed without abridgement. There is a sense, therefore, in which the judiciary, while a part of the government, stands alone and outside of the government, and holds the government to its proper and lawful course.[1] The judges must, therefore, be free from restraint by the other branches, able to act with no thought of consequences to themselves. How this independence can be secured is a question that has roused much discussion. The problem is to throw around the judges as many safeguards as possible, while yet maintaining some means by which they can be held to an ultimate responsibility. The experience of all peoples indicates that the best results will be attained where the judges (a) are appointed, rather than elected, and without regard for party affiliations, (b) hold office during good behavior, (c) are not subject to removal by the executive, (d) can be removed only for misconduct, and by impeachment or on joint address, *i.e.*, petition, of the two houses of the legislature, and (e) are immune from diminution of their salaries during their tenure of office. These principles were first worked out in England, where they have prevailed since the close of the seventeenth century. As we shall see, they are adhered to with good effect in our own federal judiciary, although they do not fully prevail in the judicial establishments of the states.

Is the electorate a branch of government?

Some people nowadays regard the electorate, *i.e.*, the body of voters, as forming also a branch of government. "The powers of the electorate," says one writer, "are as truly governmental as are the powers of the usual three departments. Through the suffrage it exercises the executive power of appointment and may compel resignations through the recall, through the use of the initiative and referendum it may exercise large and important lawmaking powers, and by its right of jury service it aids the judiciary in the settlement of civil and criminal cases."[2] Obviously, the electorate

[1] "The judiciary may be said to be the great adjusting force in government, on the one hand upholding the established rights of the individual against encroachment by another individual or against any conscious or unconscious usurpation on the part of the powerful legislative and executive branches of government, and on the other hand curbing the uprisings of individuals or bodies of individuals who rebel against the legal acts or enactments of the legislative or executive branches." L. H. Holt, *Introduction to the Study of Government*, 89.

[2] J. Q. Dealey, *The State and Government*, 171. Cf. W. F. Willoughby, *Government of Modern States*, Chap. XII.

cannot be considered a part of a government without a somewhat drastic reconstruction of our conception of what a government is; and it is doubtful whether the change would be in the interest of clearness or truth. In all popularly-governed states, however,—and this includes by far the majority of modern states,—the people (more accurately, the voters) indisputably form the basis upon which all government rests; and without confusing matters by labelling the electorate a branch of the government itself, we may very properly take some note of what the electorate is and of what position it occupies in the political system.

The electorate and the "people"

The electorate may be defined as that portion of the whole body of inhabitants of a state which is entitled to vote on political matters. To vote is to give expression to one's individual will, and electoral systems are devised to make possible a simultaneous expression of individual wills, with a view to arrival at a consensus, or at all events a majority view. However broad the franchise, the electorate can never include the whole mass of the people; and it becomes important to observe what the relation is between these two bodies. As has been pointed out elsewhere, sovereignty ultimately rests in the people as a whole. The people in the mass cannot, however, actually exercise sovereign powers; they cannot even, in the mass, delegate this exercise of powers, or indeed act in any manner whatsoever; for a considerable proportion—children, for example—are incapable of participating in political action. What happens, therefore, is that, by one means or another, some part of the people which is presumably most capable politically acquires the exclusive power to exercise the electoral function, and therefore to control the course of the government. This part of the whole population, be it large or small, is the electorate; and it becomes the actual, legal sovereign. It, and not the people as a whole, makes and amends constitutions, elects parliaments and congresses, chooses executive officers, and in some instances proposes, and even enacts, laws. The theory that the people as a whole is the sovereign is worth holding to; for, after all, the government must be conducted in the interest of the entire body of citizens, and not simply in that of the electorate. More than this, the government is ultimately responsible to the people as a whole. If the electorate abuses its privileges, ignores the interests of that part of the people not included in its ranks, or refuses to admit classes that are reasonably qualified to have a voice in public affairs, there is a right of revolution which, in extreme cases, may

CHAP. VI

justly be invoked by the dissatisfied elements.[1] Normally, the electorate is the actual, legal, working sovereign; but, in the last analysis, the government belongs to the people, not to the electorate.

Composition of the electorate

In the operation of a political system hardly any question can arise of more importance than the composition of the electorate. Not all of the people can be included. What classes shall be excluded, on what grounds, and by what authority? It was a tenet of the French political philosophy of the eighteenth century that every citizen has a natural and inherent right to take part in the choice of representatives for political purposes. The framers of French constitutions, however, have never undertaken to apply this principle literally, and nowadays it is commonly agreed among political scientists that the suffrage is not a right, but rather a privilege; which means that the scope of the electorate is a question of practical expediency only. Certain classes are obviously unfit to be included: children, persons of unsound mind, criminals, uncivilized or semi-civilized inhabitants. Beyond this there is room for the widest differences of opinion; and every student of modern history knows how sharp have been the controversies that have raged over the question. Many tests for voting have been employed, based upon residence, age, sex, race or color, citizenship, property-holding, tax-payment, education, religious belief, occupational or legal status. The trend of modern political development has been, however, pronouncedly in the direction of fewer tests, a more liberal suffrage, and therefore a larger electorate. Qualifications based on race, color, religion, and occupation practically disappeared long ago. Property-holding and tax-paying requirements have of late been generally repealed. Educational qualifications persist in several of our American states, but are hardly known elsewhere. The voting age has been fixed almost everywhere at twenty-one; and within the past ten or fifteen years the disqualification of women as such has been partially or wholly removed in many lands. Under fresh impetus supplied by the Great War, the world seems to be fast approaching the point where it can be said that, by and large, all adult men and women who are in good standing as citizens are voters.

Many disqualifications removed

The question of who shall be permitted to vote is, however, only

[1] The so-called Dorr Rebellion in Rhode Island in 1841-42 affords an interesting illustration of the use of this right. See W. F. Willoughby, *Government of Modern States*, 280-284.

one of the many problems connected with the electorate. Shall each member of the electorate have but one vote? Or shall some members have two or more votes? "Plural voting" still prevails in Great Britain, under greater restrictions than formerly and in two or three lesser states. But elsewhere the rule of "one person one vote" is followed. Again, shall voting be purely voluntary, or shall it be made compulsory? In Spain, Belgium, New Zealand, Tasmania, certain Swiss cantons, and four or five Latin American states electors are required, under penalty, to present themselves at the polls unless they can give a valid excuse. Notwithstanding, however, the habitual failure of large numbers of electors in all lands to avail themselves of their privileges, the plan of compulsory voting has not found general favor.

Plural voting

Compulsory voting

Still other questions relating to electoral procedure readily suggest themselves. How shall the possession or non-possession of electoral qualifications on the part of individual claimants be determined? It would be theoretically possible to have each elector establish his right whenever he tenders his vote. But this would involve intolerable confusion and delay, and hence states regularly employ some kind of registration system which enables the electoral lists to be prepared with due deliberation in advance and to be kept up to date by periodic revisions. Another urgent question pertains to the physical arrangements under which the votes of the electors shall be cast. There was a time when the voters simply presented themselves before the proper authorities and announced their votes orally and publicly. This system obviously offered limitless opportunity for bribery and intimidation; and although it persisted in Prussia and some other places until the political reconstruction following the World War, most states during the second half of the nineteenth century adopted some form of written vote. For a time the ballot was, however, only theoretically secret; for the ballot papers were furnished by the candidates or their friends; they were usually of such size, color, shape, or texture that, even when folded, they could be distinguished by the officials and bystanders; and they were circulated some days in advance of the election, and in many cases were marked before the voter went to the polls at all. The Australian ballot system, which came into general use in the United States and elsewhere in the last two decades of the nineteenth century, largely remedied these defects. Under it the government furnishes the ballot papers;

Other electoral questions

CHAP. VI

these papers are uniform in all respects; they are given the voter only when he appears at the polls; and they must be marked in the secrecy of a voting booth.[1]

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[1] Other electoral questions, which space forbids to be taken up here, include: How shall the votes be counted and the results announced? How shall contested elections be decided? What special precautions shall be taken to prevent the purchase of votes and other "corrupt practices"? Shall election be by plurality in single-member districts or on some plan of proportional representation? These matters will be considered, in relation to American practice, at appropriate points below.

CHAPTER VII

THE POSITION OF THE INDIVIDUAL

Liberty and its limitations

We have seen that an essential attribute of the state is sovereignty, which means a supreme power of control over all individuals and associations of individuals within the state's jurisdiction. This seems to imply a complete antithesis of sovereignty and liberty. If the authority of the state is absolute, how can men be "free"? If, on the other hand, the individual has liberty, what becomes of sovereignty?

A moment's consideration will show that the difficulty is more apparent than real. Everything depends on what we mean by liberty. If we mean by it complete absence of restraint, there is no denying that it is irreconcilable with the power, or even the existence, of the state; for the state exists to maintain government, and government means restraint. Hence the anarchist, who professes to believe in a régime of absolute individual freedom, would abolish the state altogether. It is significant, however, that even the anarchist provides in his plans for the voluntary association of individuals in community, or other, groups. What is the object of such combined effort? Primarily the protection of life and property. Against whom is protection needed? Obviously, against such people as covet other men's property and have little regard for other men's lives. Men of this sort are to be restrained from following out their desires or impulses. Starting by denying the right of the state to coerce the individual, the anarchist thus ends by recognizing precisely such a right, even though he refuses to call the coercing group or association a state.

Necessary social restraints

If the anarchist cannot devise a régime of absolute individual freedom, we may be sure that the thing cannot be done. The fact is, of course, that a society organized on such a plan is impossible: one member of it—but only one—might conceivably be absolutely independent of any influence save that which he himself wills, and might be powerful enough to realize all of his desires. His "liberty," however, would of itself put restraints on all other individuals in that society. Obviously, liberty is not absolute, but

CHAP. VII

relative and limited. The authors of the French Declaration of the Rights of Man (1789) had this idea when they defined liberty as "the power to do everything that does not injure another." Herbert Spencer expressed the same thought when he said that "every man is free to do that which he wills, provided he infringes not the equal freedom of any other man." A man living alone on a remote island might have absolute liberty: he could interfere with no one, and no one could interfere with him. But living in a society, he must be prepared to recognize that other men besides himself have rights; he must give up his freedom to prey at will upon his fellows, in order that he shall be shielded from being preyed upon by them; he must see that true freedom for each comes only by restraint upon all, that liberty is inseparable from law.

No "rights" as against the state

The position of the individual citizen in relation to the state and to government is now easily brought into view. The general enjoyment of liberty requires the existence of a coercive force. This force is the state. All individuals who compose a given state have surrendered to it their separate wills, and as against it they have, legally, no rights whatsoever. So far as is physically possible, the state can control in the minutest detail every act of every person who is subject to its jurisdiction. It can take away the property of every citizen, or of every tenth citizen, without compensation; it can make wearing a beard a capital offense; it can legalize murder or require all citizens to worship a graven image. If it (*i.e.*, the people who compose it) wants to do these things, what power is there anywhere to prevent it from doing them?

The state theoretically, though not practically, absolute

Having established the ultimate right of the state to do anything that it wills, the next matter to note is the perfectly obvious fact that no people which has advanced far enough to attain statehood has any desire to make actual use of all of the powers which statehood involves. What happens is, rather, that the sum total of powers is broken into segments, and the state undertakes actually to wield only those powers included in one segment; to all intents and purposes, the remainder do not exist. Theoretically, the people composing the state determine the nature of this division and, having done so, create an agent, which we know as the government, to carry the state's exercisable powers into effect. The people of a state, of course, do not always literally make the segregation of powers and create the governmental agent. Certainly

they did not do so in any of the monarchical states of earlier times. Nevertheless, by accepting and living under the arrangements that are made for them, they become the ultimate, even though passive, authors of their political condition. They still compose the state; they can rise in their might and make whatever new arrangements they desire.

Rights as against the government

The nature and range of the authority thus directly or indirectly conferred upon the government are regulated in or by a constitution. Every government is conducted in accordance with a constitution, even though in an autocratically governed land the constitution is likely to consist of ill-defined and flexible usages, rather than of a definite and written body of rules such as we have in the United States. The constitution says, with more or less definiteness, what powers the government may exercise, and outside of its bounds the individual citizen is free from political restraint. The individual holds his "rights," therefore, as against the government, and not as against the state; as has already been said, he has no rights which the state is bound to recognize. The government, however, has only limited, conferred powers; and in the event of a dispute, the individual may be able to show that, under the grant of authority which it has received, the government is not entitled to exercise a given power of restraint to which it has laid claim.

We must, however, avoid the error of supposing that individual liberties—or the rights to which they give rise—are ever absolute, even as against the government. Suppose that a state has put into its constitution a guarantee of freedom of speech. This does not mean that an individual within that state is at liberty to say anything whatsoever in any place and at any time. He must not use his privilege in such a way as to interfere with the freedom of speech, or with the other rights, of his fellow-citizens; and he must not use it to the jeopardy of the state which has bestowed it. He may not, for example, give vent with impunity to slanderous or treasonable utterances. Even the most solemnly guaranteed individual rights are, therefore, subject to the important qualification that they are valid only in so far as they are not used to interfere with the equal rights of others or to be a menace to the state.

How rights are defined and protected:

How are individual rights defined and guaranteed? There are three principal methods. The first is specific enumeration in a written constitution. This is distinctly the American method: our

CHAP. VII

1. Specific enumeration in a written constitution

national constitution and most of the state constitutions contain either formal "bills of rights" or articles of an equivalent character. The effect is to place the rights or liberties enumerated entirely beyond the power of the government to curtail. Theoretically there is advantage in this. Practically, however, there is some disadvantage, because changing conditions require that in the interest of justice individual rights shall from time to time be freshly defined. At all events, new qualifications and limitations must occasionally be imposed. This readjustment can be made, of course, by amending the constitution. But amendments are usually difficult to procure, and rights once conceded in a constitution are extremely difficult to withdraw. "It is now the best legal opinion in the United States," says the authority mentioned, "that, not only has the statement of these [individual] rights, in the absolute form in which they appear in the federal and state constitutions, led to an enormous amount of litigation, but that the hands of the government have been seriously tied in its efforts to introduce legal and social reforms urgently demanded by the people themselves. So serious is the situation that it is almost impossible to enact any important social legislation without having its legal validity immediately challenged in the courts."[1]

2. Broad guarantee in a written constitution

A second plan, for which much can be said, is to put into the constitution a broad guarantee of individual rights, yet to endow the government with power to introduce such definitions and restrictions as experience shows to be desirable. This is the method of Switzerland, of Japan, and of China. Thus the Swiss constitution, instead of making a flat grant of freedom of the press, says that "the freedom of the press is guaranteed; nevertheless the cantons, by law, may enact measures necessary for the suppression of abuses."[2]

3. Reliance on tradition

Great Britain, France, and some other states follow, however, a still different method. They make little or no attempt to define individual rights in any constitutional document. It is true that certain rights of Englishmen are solemnly guaranteed in such instruments as the Habeas Corpus Act and the Toleration Act. These measures, however, are only statutes, and can be repealed or altered at the will of the power that originally enacted them, namely, Parliament. In other words, Parliament is no more subject to legal limitations in dealing with individual rights than in

[1] W. F. Willoughby, *Government of Modern States*, 153.
[2] Art. LV.

dealing with anything else. It is true, also, that some of the best French constitutional lawyers hold that the individual rights enumerated in the Declaration of Rights of 1789, although not mentioned in the constitutional laws of 1875, have full force and sanction today.[1] But even if this be conceded, it must still be recognized that the Senate and Chamber of Deputies can amend the republic's fundamental law so as to make any change in the status of the individual that they desire.[2] In the final analysis, therefore, a citizen of Great Britain or of France has no protection at all against the government under which he lives, for the reason that the state which stands back of this government has not seen fit to impose absolute restrictions in the manner with which we are familiar in the United States. The reason why it has not done so is that no such restrictions are needed; for we know that, practically, there are no parts of the world in which individual rights are more scrupulously respected than in the two countries mentioned. The fundamental guarantee of these rights is the tradition and beliefs of the people, coupled with the responsiveness of the government to the public will. If these were not sufficient, others would before now have been provided.

Kinds of rights

Political philosophers and the makers of constitutions and of political programs have from time immemorial busied themselves with drawing up lists of human rights. During the Puritan Revolution in England the "natural" rights of men were commonly represented as being life, liberty, and property. The American Declaration of Independence asserted that among the "inalienable" rights with which the Creator has endowed men are life, liberty, and the pursuit of happiness. The French Declaration of 1789 named as the "natural and imprescriptible" rights of man liberty, property, security, and resistance to oppression. There is, perhaps, no subject on which more theorizing has been done; and the ramifications of the ideas that have been advanced on "natural," "ethical," and "moral" rights are endless. Happily, we are concerned here only with legal, *i.e.*, enforcible, rights—the rights which each state, at bottom, fixes for, and guarantees to, its own citizens.

Classes of legal rights:

Human desires and aspirations are largely the same everywhere, and in the more advanced states today legal rights, however different in degree, are not very dissimilar in kind. They can be

[1] L. Duguit, *Traité de droit constitutionnel*, II, 13.
[2] F. A. Ogg, *Governments of Europe* (rev. ed.), 383-386.

CHAP. VII

classified in various ways, but perhaps the most fundamental distinction is that between (a) substantive rights and (b) procedural rights. Substantive rights arise from positive immunities from restraint; procedural rights arise rather from restrictions upon the manner in which restraint can be lawfully exercised. Rights of a procedural nature are designed to prevent the government from exercising powers which are themselves entirely legal in an arbitrary or unjust manner. These rights have been more generally recognized and defined in English-speaking countries than elsewhere, although they have won noteworthy recognition in constitutions framed in central Europe since the Great War. They have been given special prominence in the United States, where the national constitution, particularly in the first eight amendments, abounds in provisions pertaining to them. A familiar example is the regulation that "no state shall deprive any person of life, liberty, or property without due process of law." Another is the requirement that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation"; still another is the injunction that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1]

1. Procedural rights

2. Substantive rights

Substantive rights are of many kinds, but can be thrown into four main classes. The first class comprises civil rights, pertaining to person and property. Familiar examples are freedom of speech, immunity from arbitrary arrest and imprisonment, ownership and free disposal of property, and guaranty against the taking away of property without just compensation. The second group relates to religious freedom, and includes exemption from restraint in the expression of religious opinions and in forms and modes of worship. The third group is political, and usually includes the right of peaceable assembly, the right of petition, and the right to seek and hold office—in short, the right to influence the policies of the government and to aid in carrying these policies into effect. It should be observed, however, that political rights are not shared by all citizens—men, women, and children—in the manner of civil and religious rights. No rights are inherent or absolute; but rights of a political nature are farthest from being so. And this is especially true of the so-called right to vote. Properly viewed, the

[1] The status of the citizen in the United States will be somewhat fully analyzed at a later point in this volume. See Chap. XIV.

suffrage is a privilege, not a right at all. Until lately, it was withheld, not only from all women and children, but from large numbers of men. Women have now been widely enfranchised; but obviously there must always be many citizens, especially minors, who are not permitted to vote, or indeed to exercise political powers of any sort.

A fourth group of rights may be said to consist of individual liberties in general, as distinguished from the more specific immunities from control of the person—"exemption," Lord Bryce terms it, "from control in matters which do not so plainly affect the welfare of the whole community as to render control necessary."[1] An example is the right of a man to paint his house any color that he likes, regardless of the esthetic ideas of his neighbors; another is his right to neglect his business, even to the point of falling into bankruptcy.

Obligations of citizenship:

The state sets up and maintains government as a means of promoting the well-being of men, and it has the same object in view when it guarantees individual rights as against governmental authority. In return, the citizen has obligations and duties. Three practically cover the ground: allegiance, obedience, service. That the citizen owes allegiance to the state of which he forms a part hardly requires argument. All states recognize treason, *i.e.*, breach of allegiance, as a heinous offense; as a rule, it is punishable by death. The naturalization of aliens is commonly so carried out as to stress the central fact in it, namely, the transfer of allegiance from one state to another.

1. Allegiance

2. Obedience

Obedience is also an obligation. Practically, this means, of course, obedience to the *government;* for it is through the government that the state speaks. Obviously, there can be no effective government unless the laws are obeyed and the decisions of officers and courts are carried out. Here, however, arises a difficult question. Are citizens obligated to obey a tyrannical government? The answer must depend largely on the circumstances. If the people can show that the government has usurped powers, or indeed that it has been tyrannical simply because it was able to overbear the public will, they are entitled to bring about a change of government if they can do so. If the people as a whole are not inclined to exercise this "right of revolution," the position of the individual malcontent becomes admittedly difficult. He may use his influence in all lawful ways to bring about a change. But

[1] *Modern Democracies*, I, 54.

CHAP. VII

unless, and until, his way of thinking prevails, he must obey the constituted authorities; or if, for conscience' sake he defies the law, he must accept the penalties that fall upon him and find such comfort as he can in the approbation of his conscience.

3. Service

The third great obligation is service. Legally, the state has a right to demand of every citizen any kind, and any amount, of service of which he or she is capable; and, under varying limitations fixed by constitutions or other fundamental laws, the government has the same right. In times past, personal service to the state has taken many forms: service in the army or navy; assistance in suppressing riots or rebellions, or in arresting disturbers of the peace; office holding (which has not always been considered a privilege or honor); jury service; labor on highways and other public works; and, by no means least, the payment of taxes. In earlier days, much service was rendered in the form of produce or manual labor. Nowadays, however, taxation is the commonest form. Rather than neglect their own affairs in order to discharge their obligations by working for the government with their own hands, the citizens turn over to the government a small percentage of their savings; and with the money thus obtained the government hires its own workers, who by giving all of their time, under a voluntary arrangement, attain a proficiency not to be expected of compulsory service. Complete immunity from direct personal service, in case it is needed, is, however, never attained. Even in the United States, where personal liberties are amply protected, any able-bodied man is liable to be called out at any time of emergency to become a member of a *posse comitatus,* or to assist in guarding property, or to aid in subduing a conflagration; and he can be compelled to render these and other services at the point of the bayonet, and without hope of compensation.

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PART II. THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

CHAPTER VIII

COLONIAL BEGINNINGS

A concrete governmental system now to be studied

Having seen something of the nature and objects of government in general, we are now ready to take up the study of a particular system of government and to observe how some of the definitions and principles that we have evolved work out in practice. The government which we are to consider in this way is, by good fortune, that of our own country. It is quite as natural and easy to describe the origins, forms, workings, and problems of government in terms of American political experience as in any other; and there is the added advantage that in doing so we gain a familiarity with our institutions which is indispensable to good citizenship. The American government is the student's own government. It makes the laws under which he lives, levies the taxes which he pays (or will some day pay), protects his life and property. It is capable of being wisely or foolishly administered, of being made a blessing or a burden to mankind, of being turned in new directions, reconstructed, or replaced with some entirely different scheme, according as he and his generation determine.

Reasons for special interest in American government:

The government of the United States merits study, however, not by Americans alone, nor by them merely because it is their own system. There are special reasons—in addition to the fact that it applies to three million seven hundred thousand square miles of territory and wields control over one-thirteenth of the entire population of the globe—why students of government everywhere look to it with interest. To begin with, it was in the United States that the federal form of government was for the first time brought into operation on a large scale. Greece and northern Italy had, in ages long past, made use of the federal principle; Switzerland and the Netherlands were, in the eighteenth century, organized on that basis. But the United States first showed the possibilities of

CHAP. VIII

the principle as applied over a wide area, and at the same time proved it not inconsistent with strong national government. In the second place, the United States first refuted the old idea that a republican form of government is not feasible in a large and expanding state. The French philosopher Montesquieu, near the middle of the eighteenth century, praised republicanism highly, but thought it not suited to a country so large as his own. All early republics were small, and long after representative government became a familiar concept political writers clung to the notion that large states must be monarchies. Even before the mechanical developments of the nineteenth century brought scattered populations into quick and easy communication, the United States, however, proved that republicanism is workable on a large, as well as a small, scale.

1. Federal form

2. Republic with large area

Special interest attaches to American government, in the third place, because throughout its history that government has been a great experiment in democracy, and has been so viewed by the world. It is true that government in this country was in the earlier days by no means completely democratic; it is not in all respects democratic even now. But it has always been more democratic than most other governments, and while Americans have themselves commonly taken democracy for granted, for a century, as a recent writer observes, intelligent Europeans "were aware that popular government and social equality on such a grand scale were new things in the world."[1] In the fourth place, the governmental institutions and experience of the United States have deeply influenced the political development of many widely scattered states and peoples. Our own colonies—Alaska, Hawaii, Porto Rico, the Philippines—have received the American impress. Latin America, although drawing its law and culture largely from Spanish and Portuguese, and therefore non-Anglo-Saxon, sources, has copied extensively from the United States in political matters. The governments of the British overseas dominions—Canada, South Africa, New Zealand, and especially Australia—combine principles and forms drawn almost equally from the mother country and from the United States. The makers of the new constitutions of central and eastern Europe which flowed from the political transformations wrought by the World War were often profoundly influenced by American principles and precedents.

3. Viewed abroad as experiment in democracy

4. Influence on government throughout the world

This great governmental system was not created out of hand

[1] C. Becker, *The United States, an Experiment in Democracy*, 2.

or by mere fiat. On the contrary, it is a product of growth, and its roots reach far into the past. He who would understand how it has come to be what it is must push his inquiries back beyond the adoption of the constitution, beyond the Declaration of Independence, beyond even the settlement of the seaboard colonies, into the England of Queen Elizabeth, of Edward I, of Henry II, indeed of the good King Alfred. The original United States was, of course, not wholly English in origin, and as constituted today the nation is far from being entirely of English antecedents and character, in race, in ideas, even in language. For a hundred years before the Revolution, however, the country throughout its original extent was English territory, governed by Englishmen in English fashion, and its political institutions were, with rare exceptions, English. The settlers of New England and Pennsylvania and the Carolinas were mainly Englishmen, who came to the New World from various motives—love of adventure, desire for religious freedom, hope of economic betterment—but who in any case brought their English customs and ideas with them and had no intention of becoming anything other than Englishmen. They brought with them, too, all the rights and liberties which their forefathers had wrested from tyrannical nobles and autocratic kings: the right to participate, through representatives, in the making of laws; the right to equal treatment under the law; the right of self-taxation; the right of jury trial; the right to invoke the privilege of habeas corpus; the right of petition; the right of assembly. In so far as it was applicable, the common law was theirs in the new home no less than in the old. The colonial governments, whether imposed from London or set up by the colonists independently, were English-made and English-controlled.

Continuity of American political development

What the colonists brought with them

After the Revolution, the United States went its way as an independent nation; thenceforth American history and English history flowed in different channels. The Revolution was, however, not a cataclysm which cleared the ground for a wholly new social and political order, such as the great upheaval in France a decade later proved to be. Rather, it was only a secession. The patriots of 1776 took up arms fundamentally because they regarded the colonial policy of the mother country (especially as that policy found expression in the new taxes and in new devices to enforce the navigation laws) as unjustifiable, and because every other means of protecting what they felt to be their rights had failed. There were, indeed, critics of English political institutions among

The Revolution only a secession

CHAP. VIII

them. But such there were, and had always been, in England itself, and, speaking generally, the colonists, as late as 1775, had no desire to destroy or supplant the forms of political organization under which they lived.

Survival of colonial institutions

Leading somewhat unexpectedly to independence, the Revolution started new lines of political development. The governmental institutions of colonial days were, however, largely carried over into the new era. The colonial charters survived to a considerable extent in the state constitutions; indeed, the charter granted to Connecticut by Charles II in 1662 served as the constitution of that state until 1818, and the charter received by Rhode Island in 1663 was superseded by a new constitution only in 1842. The colonial governor, with powers considerably altered, became the state governor. The colonial legislature went on substantially as before. County and town governments were but slightly modified. The suffrage was somewhat broadened, but not greatly. Qualifications for office-holding were relaxed, but only slightly. Everywhere the English common law remained the basis of the legal system.

Great changes since 1789, yet essential continuity

The building up of the national government, and especially the adoption of the constitution, following a period of unusual political unsettlement and experiment, caused a wider departure from the past; and the steady expansion and readaptation of our political system since 1789 has brought us so far from our point of departure that the contrasts between, not only the English government and our own, but also our own government as it stands today and as it stood a hundred years ago, strike the observer very forcibly. These contrasts are, indeed, vast and significant, and they will frequently occupy our attention in the following pages. Yet it must never be forgotten that the development of government in the English-speaking world has been a long, steady progression, in which the United States has shared deeply, and that newer forms and practices in this country, as in the motherland beyond seas, are grounded upon and circumscribed by institutions and usages that are very old.

Natural variation of colonial governments

The early English settlements on the Atlantic seaboard were established under varied conditions and by dissimilar groups of people. Virginia was founded by a London trading company and for a period was managed like any other commercial corporation. Plymouth was settled by earnest men of religion, whose main object was to find a place where they could worship as they de-

sired. Maryland was colonized under the auspices of a great Roman Catholic proprietor, Pennsylvania under the guidance of a Quaker magnate. The first of the permanent colonies within the present limits of the United States, furthermore, dated from 1607 and the last from 1733—a stretch of a century and a quarter in which English government and civilization at home underwent great changes. Likewise, the settlements were drawn out along a north and south sea-coast more than twelve hundred miles in length as the crow flies, embracing the sub-tropical borders of Florida and the snow-capped hills of New England.

Under these circumstances it was inevitable that the thirteen colonies should differ considerably in political organization. Some were governed under charters granted by the king to a single proprietor, as Baltimore or Penn; others, under charters issued to a company or corporation; still others, lacking a charter or other fundamental law, drew up constitutions of their own, as did Connecticut in 1639,[1] and made these serve until formal charters could be obtained. Until late, the mother country had no fixed policy concerning forms of colonial government. Hence the provisions of the charters on this subject were not always the same; and naturally those governments which were set up by the colonists themselves, although following English precedents, represented a spontaneous adjustment of political means to time and circumstance. Virginia, with its widely separated plantations strung along the river banks and its sharply divided population of landholding aristocrats and subject servants and slaves, could not have been expected to employ the same political forms as Massachusetts, with its compact, town-dwelling, and relatively homogeneous population.

Yet a strong tendency to uniformity

Taking the colonial period as a whole, there was, none the less, a pronounced tendency toward political uniformity. All of the colonies except Rhode Island, Connecticut, Maryland, Pennsylvania, and Delaware ultimately became "royal provinces," administered under royal commissions by governors appointed directly by the king; and the five colonies named had charters of one sort or another providing for governments fundamentally like the others. All of the thirteen had legislatures, which everywhere drew to themselves steadily increasing powers. All had the same

[1] The text of Connecticut's "Fundamental Orders" is printed in W. MacDonald, *Select Charters and Other Documents Illustrative of American History*, 60-65.

CHAP. VIII

common law and practically the same judicial organization and procedure. All cherished substantially the same political ideals and made use of the same fundamental political forms.

Control from England

Every colony was a royal enterprise in the sense that the lands which it occupied belonged to the sovereign and that its government owed its validity to his direct act or tacit assent. The royal control was more vigorous at certain periods than at others, and was more frequently asserted in the royal provinces than elsewhere. But in all cases it included the right to revoke or alter charters, to disallow, or veto, colonial legislation (except in Maryland, Connecticut, and Rhode Island),[1] to hear and decide appeals from the courts, and—except in Connecticut and Rhode Island—to appoint the governor directly or to confirm his appointment when made by a proprietor. The powers of the crown were normally, of course, exercised through subordinate agencies. Questions pertaining to colonial commerce were handled mainly by the Board of Commissioners for Trade and Plantations, organized by William III in 1696.[2] Governmental affairs were managed chiefly by the Privy Council. But the king could at any time take matters into his own hands, and occasionally he did so. Until past the middle of the eighteenth century, Parliament was considered to have no general power of control over the colonies. Its acts applied to them only when they contained an express provision to this effect; and such provisions were rare. The general growth, however, of its power, combined with the rise of new and difficult imperial problems, led Parliament after 1760 to begin enacting special revenue laws for the overseas settlements. The colonists promptly objected that there was no authority for such legislation, and the quarrel that ensued became the prologue of the Revolution.

Executive character of the early charters

In earlier times the colonies were regarded as trading and business enterprises. Hence their charters, like the patents issued to other corporate and proprietary undertakings, were essentially directorial or managerial.[3] This means that the powers and functions for which the instruments made provision were almost exclusively executive. The charters did not assume to set up full-orbed governments; and although most of them provided for

[1] This power of veto was freely used. In 1705 Queen Anne negatived fifty-three laws of Pennsylvania at a single stroke. *Pa. Statutes at Large*, II, 454-456. There were, however, ingenious ways of evading the effects of a veto. See E. Channing, *History of the United States*, II, 242-243.

[2] *Ibid.*, 231-239.

[3] P. L. Kaye, "The Colonial Executive prior to the Restoration," in *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XVIII, 8 (1900).

the calling of a legislative body at some future time, only those of Connecticut and Rhode Island were very definite on the subject. The executive agencies were expressly ordained; legislative, and to a considerable extent judicial, authorities were left to be supplied—as they soon were—by the companies, the proprietors, or the settlers themselves. When, in later times, the charters were revoked or revised and the colonies, in the main, became royal provinces, every care was taken to safeguard the authority and influence of the executive; and although the popular assemblies steadily grew in power and in independence of spirit, the executive, in most cases, kept the upper hand until the Revolution.

The governor

In every colony the chief executive was a governor. In the eight royal provinces this official was appointed directly by the king and was regarded as his immediate representative. As a rule, governorships were bestowed as rewards for services rendered the crown or as patronage solicited by influential men for their relatives or friends; hence the general level of ability was not high. There was no fixed term of office, and tenure was extremely uncertain; the ten royal governors of Massachusetts served an average of eight years, but changes were elsewhere more frequent. Normally, a governor was in charge of a single province. But sometimes his jurisdiction was extended over two or more provinces, as was notably the case during the ill-fated governorship of Edmund Andros in 1687-88.[1]

Executive functions

The governor's function was two-fold. He was the agent of the British crown, the guardian of interests that were imperial. But he was also the head of the somewhat separate and autonomous government of the colony. In the first capacity he was expected to proclaim and enforce the orders of the home government, to keep the king and his ministers informed upon colonial conditions, to advise upon policies and measures, and to oversee the minor royal officials stationed in the province. In the second capacity he enforced the laws made in the colony, appointed various civil and military officers, commanded the armed forces, issued war- . the treasury, and represented the colony in its dealings .er colonies and with foreign states.

Control over legislation

governor's duties were, however, by no means exclusively e and administrative. In the first place, he had much over legislation. He summoned, prorogued, and dissolved embly. He sent messages to that body and addressed it

[1] Channing, *History of the United States*, II, 173-185.

CHAP. VIII

in person, not only communicating the wishes of the home government, but making recommendations of his own. In most colonies, he nominated the council, which served as the upper house of the legislature; and he presided over its deliberations. He had an absolute veto, and used it freely. He issued proclamations or ordinances having the force of law, although in the eighteenth century this power was considerably curtailed. Furthermore, he had important judicial functions. His commission regularly made him "chancellor," and that meant that he was head of the highest court in the colony. He also had extensive powers of pardon (except in cases of murder and treason) and reprieve.

Variable nature of the governor's powers

The legal powers of the governor were thus very extensive, and in practice they were amplified by his official prestige and social position. It was possible, too, to acquire still fuller domination by more or less questionable methods, for example by using the power to designate the returning officer for elections in such a way as to pack the assembly with one's supporters. Naturally, the governor's personality also helped determine the range of his influence. There were, however, some important restrictions. The sweeping powers conferred in the commission issued at the time of appointment were apt to be much curtailed by instructions later sent out from London, and the governor was often called upon to perform acts of which he did not approve. Equally important was the restraint arising from the assembly's power of the purse. The incessant quarrels of the governors and assemblies in the eighteenth century centered in the use of this power, and by degrees the popular bodies established the right to make and withhold appropriations at pleasure. The governor's measures and requests were often thwarted by the refusal of an assembly to provide funds, and his own personal interests were brought in jeopardy by the right which the legislatures gained to vote or hold back his salary and to fix its amount.[1]

The governor in other colonies than royal provinces

The proprietary colonies were, in effect, great estates, and there the grantees and their heirs held sway both as landlords and as rulers. When present in the colony, a proprietor usually exercised most of the governor's functions in person; at other times these duties fell to a deputy, known either as governor or as lieutenant-governor, and appointed by the proprietor with confir-

[1] E. B. Greene, *Provincial America*, 196-197. At the outbreak of the Revolution Georgia was the only royal province in which the governor's salary was paid entirely by the home government. In Virginia the amount was not determined exclusively by the assembly.

mation (after 1696) by the crown. In Connecticut and Rhode Island the governor, instead of being appointed by king or proprietor, was elected for a term of one year by an assembly composed of the governor, the board of "assistants" (or council) and a body of representatives chosen by the enfranchised inhabitants. Elected by the assembly, the governor was required to work in close conjunction with that body. He could not make appointments independently; he had no separate fiscal powers; above all, he had no veto.[1]

The governor's council

In all of the colonies the governor was advised, and to some extent controlled, by "assistants," or similar officers, who together composed a council, commonly of ten or twelve members. In the royal provinces (except Massachusetts after 1691) the councilors were appointed by the crown, usually on the governor's recommendation. In the proprietary colonies they were named by the proprietor, usually also on nomination by the governor; although in Pennsylvania the council itself shared the power of selection. However its members were chosen, the council had four main functions. It advised the governor and exercised a certain amount of restraint upon him in appointments, removals, and military and intercolonial affairs. It—or certain of its members singly—performed the duties of such present state officers as the secretary and treasurer. Everywhere except in Pennsylvania, Delaware, and apparently Georgia, it served as the upper house of the legislature, thus becoming the forerunner of the present state senate. And, with the governor, it formed, in most colonies, a court which exercised original jurisdiction in certain kinds of cases and heard appeals from the lower tribunals.

The legislature

By the close of the seventeenth century, and thereafter until the Revolution, every colony had an elective assembly, and in all except two or three cases this assembly formed the lower house of a legislature whose upper chamber was, as has been observed, the governor's council. Although variously termed a "house of burgesses," a "house of commons," and a "house of representatives," the assembly was everywhere a body of representatives elected in accordance with a general law by the enfranchised inhabitants of the colony. In the mother country, representation in the House of Commons was scant and haphazard. The counties were represented as such in varying degrees, and those towns which had

[1] For extracts from the Connecticut and Rhode Island charters see W. MacDonald, *Select Charters*, 116-119, 125-133.

CHAP. VIII

been endowed with the right by royal grant sent one or more members. But no attempt had ever been made to apportion representatives in accordance with population, and, as John Locke complained in 1689, petty towns which had fallen into utter decay frequently sent "as many representatives to the grand assembly of lawmakers as a whole county numerous in people and powerful in riches." In the colonies, representation was better systematized in that it was regulated by general law and was kept in closer relation to the distribution of population. However, there was no attempt to establish and maintain equal electoral districts, such as we now consider a necessity. On the contrary, the existing local government areas, which naturally varied widely in population, were employed, with provisions for correcting only the most glaring inequalities. In New England the town was the unit of representation. The Connecticut assembly was composed of two deputies from "each place, Towne, or Citty," regardless of population. Under the charter of 1691, the Massachusetts assembly was similarly constituted, although with power to alter the arrangement. The Rhode Island charter provided that Newport should send not more than six representatives, three other towns four each, and all other places two each. In the middle and southern colonies the unit of representation was the county, save in South Carolina, where it was the parish.

Distribution of representation in England and in the colonies

Furthermore, the suffrage was confined to a small fraction of the population. The imperial government left its colonies practically free to fix qualifications for voting as they liked. But the example of the home country—where the county electorate included only substantial landholders and the borough franchise was restricted to the principal tax-payers or to other small groups —was influential; and the well-being of the colony was usually thought to require keeping the suffrage in few and carefully selected hands. Every colony, on the eve of the Revolution, had a property qualification. In five, ownership of personal property sufficed. But in seven, no one could vote unless he owned real estate. In Massachusetts and Connecticut the voter must have real estate yielding an annual income of forty pounds. In Pennsylvania he must own fifty acres of land, or any other kind of property valued at fifty pounds. In New York he must have "land or tenements" worth forty pounds. In Virginia he must be the owner of fifty acres without a house, or of twenty-five acres with a house at least twelve feet square, or of a town lot or part of a

Restrictions on the suffrage

lot with a house of the same dimensions. Moral, religious, and racial requirements imposed other limitations. The New England colonies, especially in the earlier days, expected voters to give proof of good moral character; indeed, as a rule, the Puritans aimed to restrict the suffrage to their own church members in good standing. Catholics were often debarred; and some southern colonies excluded Frenchmen, Jews, and negroes.

Small number of voters

As a result, the electorate was, as in the mother country, very small. It has been computed that in Massachusetts and Connecticut only sixteen per cent of the inhabitants were voters; in Rhode Island, nine per cent; in rural Pennsylvania, eight per cent; in the city of Philadelphia, two per cent. On account of the difficulties of travel, the largeness of many electoral districts, and the absence of party machinery, it often happened, too, that not more than one-sixth, or even one-eighth, of the people who were qualified to vote actually did so.[1]

Qualifications for office-holding

The same undemocratic aspect is presented by the property qualifications usually demanded of the assemblymen—for example, a freehold of a thousand acres in New Jersey and of five hundred acres in Georgia—to which was commonly joined some form of religious test. Finally it may be noted that members were usually required, as in the English counties and many of the English boroughs, to be residents of the areas which they represented. In the mother country this rule was fast becoming obsolete in the seventeenth century, but in America it survived and is still generally observed, even where not a matter of law.[2]

Growth of the assemblies in power

The colonies, said Edmund Burke in 1777, "formed within themselves, either by royal instruction or by royal charter, assemblies so exceedingly resembling a parliament, in all their forms, functions, and powers, that it was impossible they should not imbibe some opinion of a similar authority."[3] Whether in corporate Connecticut and Rhode Island or in provincial Virginia, the assemblies indeed "imbibed" a decided opinion of this sort. Taking advantage of the generally broad, and even vague, provisions of the charters and other fundamental laws, they laid claim to all the powers and privileges of the English House of Commons and declared themselves entitled to make laws, or otherwise take

[1] K. H. Porter, *History of Suffrage in the United States*, Chap. I.

[2] The residential qualification in England was formally abolished in 1774. Large numbers of the members of the House of Commons do not live in the districts for which they sit.

[3] Letter to the Sheriffs of Bristol, *Works* (4th ed., Boston, 1871), II, 232.

CHAP. VIII

action, upon all manner of domestic affairs. They had, of course, to reckon with the royal power of veto as exercised through the governor or as brought to bear directly by the crown, sometimes after measures had been on the statute-book for years. But they were frequently able to nullify a veto's effect by passing a "temporary" act, or a series of such acts, accomplishing the purpose in hand. Their claims to financial power brought them into repeated conflicts with the governors. But here again they usually triumphed; indeed, their control over appropriations became a means by which they often wrested concessions from the governor, and from the crown, on non-financial matters. Many times the governor was compelled to disobey or ignore his instructions in order to keep the wheels of government moving. In short, on the eve of the Revolution the assemblies were steadily growing, not only in the spirit of independence, but in actual power; and the experience gained by their members in fighting for what they regarded as their rights became a powerful asset of the colonies in the new era of conflict.

The judiciary

Arrangements for the administration of justice followed the same general lines in all of the colonies and were modeled closely on English usage. There were commonly three grades of tribunals: the justices of the peace, the county courts, and the courts of appeal. The justices of the peace were usually appointed by the governor, although in some instances they were elected by the freeholders; and their jurisdiction extended only to petty offenses and to civil cases involving small amounts, *e.g.*, less than five pounds in New York and less than forty shillings in Massachusetts. The county courts, whose judges were appointed by the governor,[1] had criminal jurisdiction over all except capital cases and over civil cases involving varying, but relatively large, amounts. In most of the colonies the court of appeal consisted, as has been pointed out, of the governor and his council. In weighty matters, appeal lay from the courts of appeal to the king in council—that is, practically, to the Privy Council, which, in lieu of judicial "decisions" (for the body was not a court) advised the king whether to sustain the actions of the colonial tribunals or to reverse them. All of the colonial courts recognized and enforced not only the colonial statutes, but the common law and

[1] Except in New Jersey, where they were elected. An elective judiciary was unknown in England, and there were only traces of it in America prior to the Revolution.

such acts of Parliament as were made to apply to America; and English judicial procedure, including trial by jury, was universally adhered to.

Local government

The development of a colony did not go far before it became necessary to make arrangements for separate, though subordinate, management of the affairs of local subdivisions. These arrangements were naturally determined quite as much by the physical conditions under which the people lived as by the temperament of the inhabitants themselves. Hence they reproduced the institutions of the mother country less closely than did other parts of the governmental system, and greater variations appeared from colony to colony. The people of New England settled in compact communities. They could easily live in that fashion and carry on their small-scale farming and their trade; they felt the need of protection against Indian attacks; and they wanted to remain in close fellowship with the religious congregations to which they belonged. Accordingly, the main unit of local government in all of the New England colonies was the town. The county existed, but was important chiefly as a judicial area.

The New England town

The New England town was not necessarily an urban center. It was, more properly, a township, often entirely rural, although likely to contain at least a village. At all events, it was small, and its people could readily come together for worship, for social intercourse, and for political action. The governing authority was a primary assembly of voters known as the town meeting, which convened at least once a year and made by-laws on all sorts of subjects, levied taxes, voted appropriations, and elected not only the local representative (or representatives) in the colonial assembly, but the officers—chiefly a board of "selectmen" of three to thirteen members [1]—who administered the town's affairs during the ensuing twelve months. Most of the time these little governments went along with a minimum of interference from the colonial and English authorities, and the experience which the inhabitants gained in the management of their affairs, even though on a small scale, was of inestimable value in the larger era of self-government ushered in by the Revolution.

The county

In the southern colonies the plantation system caused the population to be scattered, and the principal unit of local government naturally became the county, which followed its English prototype as closely as conditions permitted. There was no popular assembly,

[1] Known in Rhode Island as the town council.

CHAP. VIII

and most of the officers—lieutenant, sheriff, coroner, and justices of the peace—were appointed by the governor, commonly on nomination by the justices. In the middle colonies a mixed system of town and county government grew up, but after 1688 the town was gradually overshadowed by the county, especially in Pennsylvania.[1]

Sources of political ideas in the colonies

Like Englishmen at home, the colonists were, in general, hard-headed, practical men who dealt with questions as they arose and were not much given to political speculation. After 1760 their remonstrances against the attempts of Parliament to legislate for them and to tax them led to much discussion of constitutional theory and political rights. Prior to that time, however, such protests as they found it necessary to voice commonly appealed to the laws and usages of the realm rather than to abstract doctrines. The political views which they held were drawn from a variety of sources. The Puritans and Quakers leaned heavily upon the Scriptures.[2] English treatises—Richard Hooker's *Laws of Ecclesiastical Polity* (*circa* 1594), Milton's political essays, Harrington's *Commonwealth of Oceana* (1657), and, above all, John Locke's *Two Treatises of Government* (1689) and Algernon Sidney's *Discourses concerning Government* (1698)—contributed much. In the main, however, the colonists' ideas rose directly out of the English constitutional system and the common law, enriched by centuries of precedent and tradition. Naturally, they added something as a result of their own experience.

Undemocratic character of colonial governments

The salient fact about political thought in the colonies is its gradual movement in the direction of democracy. Throughout the colonial period English government, while based in an increasing degree on the supremacy of Parliament, was in no true sense democratic. The House of Lords was composed almost entirely of hereditary peers, and only an insignificant fraction of the people had any part in choosing the members of the House of Commons. Of the Englishmen who came out to America, very few cherished democratic opinions. Certainly the Cavaliers who populated Vir-

[1] It should be added that the foundations of American municipal government were laid during the colonial period by the incorporation of twenty boroughs under charters conferred by certain governors. New York received the first such charter in 1686. The governing authority of an incorporated borough was, on the English analogy, a single-chambered council consisting of a mayor, a small number of aldermen, and a larger number of councilors. See W. B. Munro, *Government of American Cities* (rev. ed.), 2-5.

[2] H. L. Osgood, "The Political Ideas of the Puritans," *Polit. Sci. Quar.*, VI, 1-28, 201-231 (Mar. and June, 1891).

ginia and other southern colonies, and for generations formed a jealous, exclusive, ruling aristocracy, were not democrats, save in their dealings one with another. No more were the Puritans of New England. They had, indeed, resisted the absolutism of the Stuarts and had come to the New World in quest of freedom. But the freedom which they sought was the opportunity to set up a society based on their own civil and religious ideas, not a condition in which all members of a mixed community should have equal rights and be individually free to believe and act as they pleased. The establishment of an aristocracy was seriously proposed in Massachusetts in 1634, and shortly thereafter John Cotton pronounced democracy "the meanest and worst of all forms of government." When, in later times, religious requirements were relaxed, property qualifications were imposed similar to those which confined the electorate in the middle and southern colonies to a mere handful of the people.

Conditions favorable to democracy

Nevertheless, the colonial period, taken as a whole, saw political opinion considerably democratized. The exceedingly liberal governmental systems of Connecticut and Rhode Island were influential. The remoteness of the colonies from England made for political separateness, which in turn gave scope for the readjustment of political usage and opinion. The conditions of life in a new country, furthermore, are always favorable to democracy: social classes are not sharply differentiated; men are thrown back upon their own efforts and have a chance to win standing and power without much regard for antecedents; smallness of numbers requires the coöperation of all elements. The hardy populations which, even before 1750, were spreading through the backcountry of New England, New York, Virginia, and the Carolinas were, after the manner of frontier populations everywhere, specially inclined to democratic sentiments.[1]

Democratic tendencies

The progress of democratic opinion was farther aided by the course of politics in England itself, where, although the suffrage remained unchanged, such legislation as the Habeas Corpus Act of 1679 and the Toleration Act of 1689 steadily added to the personal liberty of the subject, and where, after 1660, the representative principle gradually won its way against the prerogative, while the cabinet plan of responsible government silently transformed

[1] The influence of the frontier on the political development of America is clearly described in F. J. Turner, "The Significance of the Frontier in American History," *Amer. Hist. Assoc. Report* (1893), 197-227, and in the same author's *The Frontier in American History* (New York, 1920).

CHAP. VIII

the entire political system. Local self-government as developed in the New England towns, although not itself as yet democratic, was a necessary antecedent of democracy. Vigorous elective assemblies, although not as yet representative of the masses, were necessary if the masses were ever to rule. The sentiment which upheld these bodies in their steady accumulation of power manifested itself also in a growing demand for popular election of a larger proportion of the officers, for shorter terms of office, for the right of the assemblies to judge the qualifications of their members, for frequent reapportionments of legislative seats, for habeas corpus acts and other guarantees of civil rights, and here and there for a broader suffrage.

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CHAPTER IX

THE REVOLUTION AND THE GROWTH OF POLITICAL IDEAS

Change of Britain's attitude toward the colonies

The movement which led to the American Revolution, the independence of the thirteen colonies, and the establishment of a new English-speaking nation in the western world may be dated from the decision of the British government, shortly after 1760, to enforce imperial regulations with new vigor and to ask the colonists to bear a share of the burden of imperial defense. Hitherto the colonies had, in reality, been largely independent. Through their elective assemblies, they managed their local affairs, with no small amount of opposition from the governors, it is true, yet with little actual restraint. Parliament made few laws which applied to them, and they were not taxed from beyond the sea except in so far as they paid duties imposed with a view to the regulation of trade. Only now and then did the home government take much note of them, save to guard them against conquest.

After 1760, however, the situation was totally changed. During the great conflict whose American phase we know as the French and Indian war, the elder Pitt roused the English nation to a new sense of the dignity and glory of the Empire, and when the war was over Englishmen of all classes were in favor of a closer integration of the imperial possessions and a general toning up of colonial administration. In particular, it was felt that the American colonies ought to be drawn into closer relations with the mother country, and that, in view of their extraordinary growth in population and wealth, they ought henceforth to be required to help the Empire pay its way. This notion fell in perfectly with the ideas of the new sovereign, George III, who gladly coupled the purpose of subjecting the colonies to the control of Parliament with his policy of bringing Parliament itself again under the domination of the king.

The new policies and measures

A three-fold program was, accordingly, determined upon. First, the trade and navigation acts were to be vigorously enforced. These were statutes (dating, in some instances, from the seventeenth century) which required the colonies to export certain of

CHAP. IX

their staple products only to Great Britain or to a British colony, and to import most of the manufactures which they needed from the mother country. Except during brief periods, these measures had never been fully carried out, and the colonists, although often complaining of their effects, had not been greatly injured by them. The powers of the vice-admiralty courts in the colonies were now increased, however, and other steps were taken to make the laws actually effective.[1] The second phase of the plan was to keep British regulars in the colonies as part of a permanent system of defense.

Sugar Act (1764) and Stamp Act (1765)

The third, and most serious, purpose was to begin raising revenue in the colonies by taxation. The late war had doubled the British national debt and had in other ways added to the fiscal burdens which Englishmen were carrying. What could be more reasonable, it was asked from one end of Britain to the other, than that Parliament should lay modest taxes in the colonies—not to obtain money for use in England, nor even to be applied to the debt—but merely to help meet the costs of the new arrangements proposed for the colonies' protection? The colonies had grown in population and wealth; they drew prestige and security from their British connections; the time had come for them to bear a share of the common burden of empire. Accordingly, the Sugar Act, imposing an indirect tax on the colonists, was adopted in 1764 with little dissent on the floor of Parliament, and the Stamp Act, laying taxes of a more direct nature, was carried the next year by huge majorities, after a debate in the House of Commons which Edmund Burke pronounced the most languid to which he had ever listened, and with no debate at all in the House of Lords.

Colonial resistance

Events proved that Grenville and Townshend and the English governing classes generally knew little of the real state of things in the colonies, and especially of the colonists' sensitiveness in all matters touching their right to govern and tax themselves. From Maine to Georgia, the new imperial policies were denounced and resisted. The colonial populations felt that they had conquered the wilderness by their own efforts, with little real aid or encouragement from the British government. They considered that they had borne the brunt of the conflict with the French, and after the peace of 1763 they had no doubt whatever of their ability to defend themselves against all comers. They considered that there was no

[1] G. E. Howard, *Preliminaries of the Revolution*, Chap. III.

point to the plan to keep British red-coats in America, unless it was to have the means at hand of overawing the colonists themselves. They believed that their markets were becoming indispensable to the commercial and landholding aristocracy of England, and that this, more than anything else, accounted for the government's sudden revival of interest in their affairs. Furthermore, they said that they were not to be regarded as having lost any of their rights as Englishmen simply because they lived in colonies three thousand miles across seas. "British subjects," wrote Franklin in 1755, "by removing to America, cultivating a wilderness, extending the domain, and increasing the wealth, commerce, and power of the mother country, at the hazard of their lives and fortunes, ought not, and in fact do not, thereby lose their native rights."

Taxation and representation

Chief among the "native rights" to which the colonists laid claim was that of governing and taxing themselves. At first the stamp tax was declared unconstitutional on the ground that it was an "internal" tax. But when, in 1767, duties were laid on importations of tea, paper, and certain other commodities, the colonists abandoned the distinction between internal and external taxes and advanced to the view that Parliament had no right to tax them in any way whatsoever. Parliament had no such right, they said, because they were not represented in it. On the other hand, British statesmen asserted with no less firmness that the colonists *were* represented.

This clash of opinion was possible because the parties to the controversy meant two very different things when they talked about representation. The Englishman at home meant simply that the House of Commons stood for, and acted in the name of, the English people as a whole. The men of Massachusetts and Virginia were part of the English people quite as truly as were the men of Manchester and Birmingham; as a matter of fact, the latter also, under the antiquated electoral arrangements prevailing in eighteenth-century England, had no opportunity to vote for members of Parliament. So long as there was no taxation except that voted by the House of Commons, no one, on either side of the Atlantic, had any right to complain. In America, however, a wholly different conception of representation had grown up. The colonists held that taxes ought not to be levied except by a body composed of persons chosen for the purpose by the taxpayers themselves. Both

CHAP. IX

sides argued honestly, but, as an American historian has observed, "each argued out of a different past."[1]

The broader issue of Parliament's power over the colonies

Moreover, the issue was not simply one of taxation; it inevitably broadened out into a question of general legislative independence. When repealing the Stamp Act, in 1766, Parliament asserted its right to legislate for the colonies in all matters whatsoever; and a series of repressive measures, following the Boston "Tea Party" of 1773, indicated that the claim was to be no mere theory.[2] One of these acts undertook to "regulate" the government of Massachusetts by striking the liberal provisions out of the charter of 1691, thereby raising the question whether the colonies' ultimate constitutional status was also at the mercy of Parliament. On the ground that Parliament's power was limited only by the physically impossible, Lord Mansfield, chief justice of the King's Bench, upheld the act. But James Otis, Samuel Adams, and other leaders of radical opinion in the colonies denied that the charters, which had been issued by the crown, could be touched by Parliament, and indeed denied the right of Parliament to exercise any control at all over the colonies' internal affairs.[3]

War begins

A series of events with which every American schoolboy is familiar rapidly widened the breach, and debate was converted into action when, in April, 1775, General Gage, in command of the British troops stationed at Boston, undertook to destroy the military stores which apprehensive colonists had brought together at Concord. The commandant's object was partially attained, but the news of what was going on drew swarms of armed patriots to the scene; the British were driven back to Boston under heavy fire, and when the day's business was over it was plain that war had begun. General Gage and his "pretorian guard" were forthwith shut up in Boston, and military preparations were undertaken at redoubled pace throughout the colony.

Would the colonies make common resistance?

The politicians, who, led by Samuel Adams, had brought the Bay Colony into this position had assumed a grave responsibility. Would the decision for forcible resistance have the support of the colonists generally? Would the colonies, as organized governments, make common cause in the fight? Ten years earlier, or even five, rebellion would undoubtedly have been frowned upon by the great

[1] C. H. Van Tyne, *The American Revolution*, 13.

[2] W. MacDonald, *Select Charters*, 337-356.

[3] The arguments employed by both sides in the constitutional controversies of the period are lucidly set forth in C. Becker, *The Eve of the Revolution*, Chaps. III-IV.

mass of the colonial population. Practically everybody was proud of his British connections and expected ultimately to enjoy, as a citizen of the Empire, all political rights to which he regarded himself and his neighbors as entitled. In 1775, however, the case was different. The old feeling of loyalty had largely given way to suspicion and bitterness. There was no general desire for independence. Yet many influential individuals were already prepared to go that far, and a few months of armed conflict convinced a rapidly growing proportion of the people that the two British realms were too unlike to enable the colonies to remain in the Empire and yet achieve their proper development. Therefore, notwithstanding large and important loyalist elements in every colony, who felt that, whatever the mistakes of British policy, rebellion was unjustifiable, the Massachusetts patriots soon had cause to believe that they would be liberally supported. Aside from widespread warlike preparations, the principal evidence was the activities of the second Continental Congress.

Obstacles to united action

It had never been easy for the colonies to work together, and at no time had an enduring union been set up among them. They were of diverse origins, and their populations were unlike in religious affiliations and cultural characteristics; they were kept apart by the difficulties of communication, and especially by conflicting interests arising from differences of climate, soil, and occupation; except during one or two brief periods, the British government required them to have separate administrations and discouraged close relations among them except for defense. Not only did they lack a form of union; they were mutually jealous and suspicious, and were divided by long-standing disputes over boundaries, Indian relations, and trade. There was no danger, wrote Franklin in 1760, that they would "unite against their own nation, which protects them and encourages them, with which they have so many ties of blood, interest, and affection, and which 'tis well known they all love much more than they love one another."[1]

Early steps toward union:

These words could hardly have been written in 1765, and they would not have been at all true in 1775; for the quarrel with the mother country following the adoption of a new imperial policy brought the colonists to a realization of their substantial community of interest and prepared them to resist British oppression by united action. The past, furthermore, had not been barren of

[1] J. Bigelow [ed.], *Complete Works of Benjamin Franklin* (New York, 1887), III, 112.

CHAP. IX

1. New England Confederation

attempts at federation. In 1643 four New England colonies—Massachusetts Bay, Plymouth, Connecticut, and New Haven—with a view to regulating Indian relations, formed a "firm and perpetual league of friendship" and agreed to send two commissioners to a joint conference every year. The confederation was active for two decades, and meetings were held as late as 1684. Boundary disputes and other difficulties, however, sapped its vigor, and after the dangers which had called it into being were past it fell to pieces.[1]

2. Albany Conference

From time to time thereafter proposals for confederation were offered, but nothing resulted until 1754, when, at the suggestion of the Lords of Trade, an intercolonial conference was held at Albany for the purpose of adopting "articles of union and confederation . . . for mutual defense." A renewal of war with the French was now imminent, and British interests were particularly menaced by the threatened secession of the Iroquois to the French side. Seven northern and middle colonies were represented at the congress, and a plan of union prepared by a committee of which Franklin was chairman was unanimously adopted. A "grand council," composed of forty-eight delegates, chosen for three years by the several colonial assemblies, was to meet annually and to have power to make laws, levy taxes, raise troops, appoint officials, and manage Indian affairs; and a president-general, named by the crown, was to exercise a veto power as well as miscellaneous executive functions. The colonial assemblies were unwilling, however, to relinquish so much authority, and not one of them ratified the scheme. The Albany Plan of Union is important, therefore, only as an instrument which was much in men's minds during the constitutional discussions of ensuing decades.[2]

3. Stamp Act Congress

The next notable intercolonial meeting was the Stamp Act Congress of 1765, held in response to a circular letter sent out by the Massachusetts House of Representatives inviting all the colonies to send delegates to New York for the purpose of preparing a loyal and humble "representation of their condition" and of asking relief at the hands of king and Parliament. Twenty-seven delegates, variously appointed, came together from nine colonies and, after eleven days of debate, adopted a "declaration of rights and grievances," a petition to the king, and a memorial and petition to

[1] For the text of the "articles of confederation" see W. MacDonald, *Select Charters*, 94-101.

[2] *Ibid.*, 253-257.

the House of Lords.[1] The body had, of course, no legal powers, and it proposed no plan of union. But it afforded an opportunity for a helpful interchange of opinion, and there was significance in the fact that, unlike the Albany Congress, it was called on the sole initiative of the colonists themselves.

The First Continenta Congress

The Stamp Act was repealed in 1766. But other measures added fuel to the controversy, and in 1774 the coercive acts passed with a view to curbing the spirit of resistance in Massachusetts became the immediate precursors of war. As soon as the full purport of these acts was known, two colonies—Massachusetts and Virginia—almost simultaneously called a general colonial congress to meet at Philadelphia in September; and on the fifth day of that month forty delegates came together, representing all of the colonies except Georgia. The delegates were chosen in no uniform manner. In Massachusetts, Rhode Island, and Pensylvania they were elected by the assembly. Elsewhere the governors adjourned or dissolved the assemblies so as to forestall an election. In Virginia, Maryland, New Jersey, and Delaware the delegates were, accordingly, chosen by specially arranged conventions of county delegates; in South Carolina, by "a general meeting of the inhabitants of the colony"; in New York, by the leaders of the popular movement in New York county; in Connecticut, by local "committees of correspondence." The Congress was therefore an irregular, revolutionary body: it was called under no legal authority; its members could in most cases lay no claim to being official representatives of the colonies from which they came; its very existence ran counter to the wishes of the sovereign British government.

Opposing views

Undisturbed by these facts, the delegates settled down to a sober-minded consideration of the critical state of the country, and more than seven weeks were spent in earnest debate behind closed doors. One group of members, including the Massachusetts and Virginia delegations, believed that war was inevitable and that the colonies might as well fight for independence as for something less. More conservative men, as John Jay and Edward Rutledge, threw their support to a plan for a union of the colonies, with a president appointed by the crown and a federal council which could make laws subject to parliamentary veto and could also veto measures of Parliament relating to colonial affairs. This scheme would as yet have met general approval in America, and its adoption by the British government would have made the Revolution impossible,

[1] W. MacDonald, *Select Charters,* 313-315.

CHAP. IX

at all events for a long time to come. But, as the radicals then asserted, there was no chance that the king and his advisers would look on it with favor.[1]

Acts of the Congress

The congress, accordingly, took action which represented a compromise between the ideas of the two groups. Like the Stamp Act Congress, it drew up moderate statements of the colonial side of the controversy, designed to influence opinion in both Europe and America: a body of "declarations and resolves," a petition to the king, an address to the British nation, and a memorial to the people of the colonies.[2] No less an authority than Pitt subsequently praised these documents for their masterly exposition of true constitutional principles. The instructions given the delegates by their constituents, however, although containing no hint of either union or independence, indicated that something more than paper assertions of principles were expected; South Carolina boldly demanded legal measures to obtain the repeal of the obnoxious laws. Hence the congress unanimously adopted a series of resolutions known as "the Association," in which the members bound themselves, and asked the people in all of the colonies to agree, not to import, after December 1, 1774, any commodities from Great Britain or Ireland, or molasses, syrups, sugars, and coffee from the British plantations, or East India Company tea from any place; not to consume any of these commodities after March 1, 1775; and not to export, after September 10, 1775, any commodities whatever to Great Britain, Ireland, or the West Indies, "except rice to Europe." With a view to carrying out these agreements, the colonies were asked to set up county, city, and town committees; and drastic measures were recommended for use against violators.[3] In form, all this was only a voluntary association to which the congress solemnly called the people. But in intent and effect it came very near to being positive, regulative governmental action, and even the Earl of Dartmouth, who was considered not unfriendly toward the colonies, is reported to have said that every signer of the Association was guilty of treason.

The situation grows more critical

Many of the colonists thought that the actions of the congress were both illegal and inexpedient; Samuel Seabury, a New York clergyman, writing under the *nom de plume* "A Westchester Farmer," considered that the self-constituted committees set up to

[1] L. K. Mathews, "Benjamin Franklin's Plans for a Colonial Union, 1750-1775," *Amer. Polit. Sci. Rev.*, VIII, 393-412 (Aug., 1914).

[2] W. MacDonald, *Select Charters*, 356-361. [3] *Ibid.*, 362-367.

enforce the terms of the Association were quite as tyrannical as the British government had ever been. But the congress had become a symbol of America united in defense of its rights, and its voice carried great weight. The committees were extensively organized; non-intercourse was widely enforced; a provincial congress assembled in Massachusetts in October, 1774, assumed full powers of government in spite of General Gage, and contrary to the provision of the late act remodeling the Massachusetts government; royalist governors were powerless to stay the preparations which daily led toward armed resistance; and already when, on April 19, 1775, the first blood was shed at Lexington and Concord, the colonists had elected delegates to a new continental congress which the first gathering had ordered to assemble on the ensuing May 10 unless in the meantime the grievances of the colonies should have been redressed.

The Second Continental Congress and its work

The second Continental Congress brought together a group of men who, in the main, still drew back from a declaration of independence. But it faced a situation totally different from that with which its predecessor was called upon to deal. War, although not formally declared, was actually going on; Boston was in a state of siege, and within five weeks the battle of Bunker Hill was fought. The times demanded bold measures, and the Congress rose to the demand. First, it decided to recruit a continental army to aid Massachusetts in driving General Gage's soldiers from her soil, and it appointed George Washington commander-in-chief of these forces. Then it issued a "Declaration of the Causes and Necessity of Taking up Arms," avowing that the colonists had "no ambitious designs of separating from Great Britain," but were "with one mind resolved to die freemen rather than live slaves."[1] And gradually it slipped into the position of a *de facto* government which raised armies, appointed officers, called upon the colonies for quotas of money and supplies, borrowed funds, issued paper currency on the joint credit, conducted the war on land and sea, regulated foreign commerce, made agreements with Indian tribes and foreign states, and exercised other sovereign functions as they became necessary. The members sat for colonies as such and usually voted in accordance with instructions received from the legislatures or other bodies to which they were answerable. They were, indeed, hardly more than ambassadors from political divisions acting together in a league or confederacy. Furthermore, they

[1] W. MacDonald, *Select Charters*, 374-381.

CHAP. IX

were chosen quite as irregularly as were the members of the Congress of 1774, and the present Congress, even more clearly than the earlier one, was an extra-legal, revolutionary body, whose actions had no sanction except the informal assent of the people. The war soon became general, and dragged out for many years; there was no other common instrumentality of leadership and control; and the Congress lived on, although with rapidly changing membership, until the Articles of Confederation took effect, in March, 1781. It was this same Congress that rose to the supreme height of revolutionary authority by proclaiming the colonies, on July 4, 1776, "free and independent states."

Political discussion during the Revolution

The decade which separated the Stamp Act and the second Continental Congress was a period of incessant debate on questions of colonial policy, constitutional law, and political theory. Such newspapers as existed lent their columns freely to the discussion; pamphlets were issued; speeches were made and sermons preached; formal declarations of rights were put forth by legislatures and other regular or special assemblages; and controversial treatises, *e.g.*, Otis's *Rights of the British Colonists Asserted and Proved* (1764), his *Vindication of the British Colonies* (1765), and Jefferson's *Summary View of the Rights of America* (1774), were given wide circulation. With the emphasis shifted from the rights of the colonists under the British constitution to the rights of men in general, and to the proper ways of organizing a government, the discussion went on unabated throughout the war. No great treatises attempted to bring the results together in systematic form. But numerous writings of the character of Thomas Paine's *Common Sense* (1776) and John Adams's *Thoughts on Government* (1776) contained striking expositions of opinion; while certain public documents, notably the Declaration of Independence and the bills of rights prefixed to several of the new state constitutions, gave authoritative, official expression to ideas that had become widely, if not generally, current.

Conflict of aristocratic and democratic forces

In the nature of things, revolution is the work of radical-minded people. In the case of America, this was doubly true, because not only was it the men of radical temper—the Otises and Patrick Henrys and Samuel Adamses—who led the colonies to conflict with, and separation from, Great Britain, but the movement became also a revolt against aristocracy and privilege in the colonies themselves. Everywhere the colonial populations were composed of two main elements, with sharply contrasted interests

and points of view. One was the little land-holding and commercial aristocracies—the tidewater planters in Virginia and the Carolinas, the wealthy commercial families of New York and Pennsylvania,the descendants of old official, clerical, and professional families in New England—which monopolized social influence and prestige, held the offices, and in the fullest sense governed. The other element was the "people," the unenfranchised small freehold farmers, tenants, artisans, and laborers. By 1775 this stratification was becoming somewhat difficult to maintain. The people on the lower plane were in many instances of liberal, and even radical, antecedents, and had migrated to America on that account; the searching discussions of the past ten years had provided a vent for their views; the back-country of Virginia, the Carolinas, Pennsylvania, and New York was filling with a hardy folk among whom prevailed the simple manners and the easy equality of the frontier. In short, the forces of democracy were growing stronger and were becoming articulate; they entered into the political discussions of the day; they took more or less irregular part in local organization for war purposes; tenants and artisans shouldered their muskets and fought at Bennington and Brandywine and Saratoga; and when new constitutions were to be made and governments reconstructed, these unenfranchised people pressed for the suffrage, the right to hold office, and other political and social recognition. The privileged classes, on the other hand, clung to English manners and ideals and were sorry when independence became necessary. They considered the English system of government quite democratic enough; they wanted "home rule," but, as one writer has aptly said, they wanted to rule at home.[1]

Radicalism in the ascendant

The Revolution became, therefore, a two-fold movement. It was a contest for independence from Great Britain; but it was also a struggle for the abolition of class privilege and the democratization of American society and politics. To a considerable extent, the privileged classes—land-owners, merchants, clergymen, and officials—remained loyal to the British government.[2] If they had kept control there would have been no separation. But sooner or later they lost their grip in all of the thirteen colonies; and the great movement which they had helped to start was carried forward by other men, on lines that led both to independent nation-

[1] C. Becker, *The United States, an Experiment in Democracy*, 46.

[2] John Adams estimated that at least one-third of the people were indifferent or actively opposed to the American cause.

CHAP. IX

ality and to internal political democratization. Some of these later leaders were, it is true, men of means and of conservative instincts; one immediately thinks of Washington, reputed the richest man in the colonies. But in the main they and their followers were people of small propertied interests and of limited business experience, with only here and there a figure of the type of Jefferson, who, although a plantation-owner and slave-holder, was by temperament and training radical-minded in politics. They were, in general, people who risked little by change, being, indeed, likely to gain something, socially and politically, by it. They did not stop with arguments for constitutional rights as colonists, or even for independence. Drawing heavily upon the great resources of English liberal thought in the seventeenth century—especially as brought together in the writings of Locke—they turned their minds to the rights of man as such, and to the reconstruction of life and government in America on more democratic lines. The Declaration of Independence was their work, and it asserted, as "self-evident" truths, that all men are created equal; that among the inalienable rights with which men are endowed by the Creator are life, liberty, and the pursuit of happiness; that governments are instituted among men to secure these rights; that governments derive their just powers from the consent of the governed; and that the people have a right to alter or abolish their government whenever it "becomes destructive of these ends"—in other words, a right of revolution. The bills of rights incorporated in the new constitutions which, even before independence, began to displace the old charters, reiterated the doctrine that the powers of government are delegated by the people, and repeated the familiar principles of the Great Charter, the English Bill of Rights, and other historic pronouncements concerning property, trials, excessive bail, unusual punishments, the writ of habeas corpus, freedom of assembly, the right of petition, liberty of the press, and other "inalienable" rights.[1] Aristocratic privileges and usages were frowned down or expressly abolished.

Negative conception of government

In their revolt against the alleged tyranny of unwise British ministers and of a misguided Parliament, many people came, indeed, to think of government as hardly better than a necessary evil. Life and property must be protected; social order must be main-

[1] On the Revolutionary bills of rights see J. Schouler, *Constitutional Studies*, Chap. III. The relation of these declarations to the English Bill of Rights of 1689 is touched upon in G. B. Adams, *Constitutional History of England* (New York, 1921), 357-358.

tained. But beyond this, it was widely held, government ought not to be permitted to assert itself strongly in the regulation of men's affairs. That government, said Jefferson, in effect, is best which governs least; and this was the notion that underlay, not only the Declaration of Independence, but the early constitutions of the states, and the Articles of Confederation as well. These new plans of government now claim our attention.[1]

The Revolutionary state governments

After the outbreak of war in 1775 the old colonial governments largely collapsed, and the control of affairs passed into the hands of rump legislatures, specially chosen "conventions," and other more or less irregular bodies. When appealed to for advice, the Continental Congress at first counseled the colonies to set up such new political machinery as was needed to carry them over to the time when good relations with the mother country should be restored; and two colonies, New Hampshire and South Carolina, drew up provisional constitutions for this purpose. As the war went on, new appeals for guidance came in, and on May 15, 1776, blanket advice was given to all the colonies to "adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[2] Virginia led off, in response, by electing a convention which drew up a constitution containing a comprehensive bill of rights and a new frame of state government. Other colonies—now become states—took similar action; and by 1780 all had constitutions, although Connecticut and Rhode Island had merely to introduce a few formal changes to make their charters adequate for the purpose.[3]

The new constitutions

Several of the new instruments were framed by assemblies chosen with constitution-making somewhat in view. But in most cases the constitutions were made and put into operation by bodies selected merely for the general management of affairs, and in only three states—Delaware, Massachusetts, and New Hampshire—

[1] The political thought of the Revolutionary period is more fully treated in C. E. Merriam, *History of American Political Theories*, Chap. II.

[2] *Journals of the Continental Congress*, IV, 342.

[3] As we have seen (p. 37), the written constitutions were a distinct innovation. They arose, however, quite naturally. In the charters, proprietary patents and commissions to royal governors, each colony had a body of fundamental organic law, in which every phase of governmental authority and organization in the colony found its legal basis and justification; so that the colonists were entirely familiar with the idea of a supreme written law by which all governmental acts and powers were to be tested. The new constitutions were devised to perpetuate this principle under the new conditions that had arisen.

CHAP. IX

were they the work of conventions which confined their labors to this one task. In a half-dozen states the constitutions were submitted to the people, but in only two—Massachusetts and New Hampshire—was popular ratification made a necessary condition of adoption.[1] On the theory that the people had an inherent right to change their form of government at any time through their elected representatives in legislature or convention, five states made no special provision for amending their constitutions. Georgia and Maryland, however, authorized the legislature to adopt amendments; Delaware and South Carolina provided for amendment either by the legislature or by convention; Pennsylvania, by a council of censors and a convention; Massachusetts and New Hampshire, by conventions called by the legislature. The idea that constitutions should be made and amended by a different agency, and by a different process, from that employed in the making of ordinary laws was less generally held than it is today, and popular ratification of amendments was required in only Massachusetts and New Hampshire. Notwithstanding the somewhat undemocratic, and even irregular, way in which most of these early constitutions were set in operation, the majority of them served their purpose, with few changes, or none, for as long as fifty or seventy-five years. Massachusetts, indeed, did not thoroughly reconstruct her constitution of 1780 until 1918.

General features of the new state governments

Although differing widely in details, these Revolutionary state constitutions, and the governments which operated under them, had many important features in common. First, the people were regarded as the sole source of authority; the rule of the king was broken, and sovereignty had passed completely to the politically organized populations of the states. Second, the governments had only such powers as were bestowed upon them by the people through their representatives, and hence were merely agents of the people. "All power being originally inherent in, and consequently derived from, the people," said the Pennsylvania Declaration of Rights, "therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." Furthermore, since it was believed that government by its very nature tends to become oppressive, care was taken to confer only those powers which were strictly necessary and to

[1] This statement applies to the New Hampshire constitution of 1784, not to the provisional instrument of 1776.

provide means by which the abuse of power could be punished and prevented. CHAP. IX

Third, the principle of separation of powers was brought into play to a greater extent than in the colonial governments. In stately language the Massachusetts constitution said: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them; the judiciary shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men." This principle, made familiar by the writings of Locke and Montesquieu, was much in men's minds in the later eighteenth century. It must not be imagined, however, that the states applied it literally and fully in their governments. In most cases they gave the legislature a decided preponderance, and even in Massachusetts the legislative and executive branches were made to check each other reciprocally. Fourth, much emphasis was placed on the rights and liberties of the individual. Seven states prefixed bills of rights to their constitutions, and in all cases it was made plain that the sovereign people had rights which were beyond the power of the government to deny or withdraw. Fifth, the doctrine of popular sovereignty was not construed to entail the establishment of complete political democracy. On the contrary, it was thought best to restrict the suffrage to men who had some financial interest in the community —practically, therefore, to property-holders. A property qualification for voting was imposed in every state, and in most cases it debarred more than half of the adult male population. High property qualifications were also required for membership in the legislatures and for office-holding.

The governor

The framers of the new constitutions drew heavily upon the English constitution and upon the political experience of the colonies. But they naturally made large use of the old charters, and it was rather the basis than the structure of the former governments that was chiefly changed. There continued to be in every case a governor, a legislature, a system of courts, and the requisite machinery for local administration. The main objection to the colonial governments had been the power, and the opportunities for the abuse of power, enjoyed by the governor. Hence the governor was now shorn of much of his authority, and in most

CHAP. IX

cases was clearly subordinated to the legislature. In most states he was, indeed, elected by the legislature, although in two or three he was chosen by the people.[1] In seven states the term of office was but one year. In Massachusetts alone was a qualified veto power allowed to the governor independently, although by 1800 four other states revived it.[2] In several instances impeachment was provided as a means of removing an unworthy or dangerous executive from office. Everywhere the governor was made to share the important power of appointment with a council or with the assembly.

The legislature

On the other hand, the legislature, as a body standing close to the people, was given comparatively large powers. The legislatures of Georgia and Pennsylvania had consisted of a single house in colonial times, and these states clung to the unicameral plan, in one case until 1789 and in the other until 1790.[3] Elsewhere the bicameral system was continued, with no important change except that the governor's council, in becoming a senate, became elective, its members being chosen—for terms of from two to five years, and by direct vote in all states except Maryland—from either existing or newly-created districts different from the areas in which assemblymen were elected.[4] Elections to the lower house were annual except in South Carolina, where they were biennial.

The judiciary

Structurally, the judicial system underwent practically no change. It was necessary, however, to provide some new mode of choosing the judges formerly named by the crown. In one state —Georgia—popular election was introduced. The remaining states adopted, in almost equal numbers, two other plans—(1) election by the legislature and (2) appointment by the governor, either with or without the consent of the council or the senate. New York, however, put the power to appoint in the hands of a committee of four senators. Appeals from American courts to the king in council were, of course, terminated by independence.

The most significant development in relation to the judiciary

[1] It should be noted, however, that even where popular election prevailed it fell to the legislature to elect when no candidate received a majority of all the votes cast.

[2] In Massachusetts measures could be passed over the governor's veto by a two-thirds vote in both houses of the legislature. In New York the veto power was shared by the governor and council, and a veto could be similarly overridden in the legislature.

[3] Vermont entered the Union in 1791 with a single-chambered legislature and kept it until 1836.

[4] In most states a separate executive council was provided for, but four discarded the arrangement prior to 1800.

Beginnings of judicial review

found mention, however, in none of the constitutions. This was the right of the courts to inquire into the constitutionality of laws and to refuse to enforce measures held to be unconstitutional.[1] Appeals to the king in council had familiarized Americans with the idea of judicial review, and notwithstanding that the constitutions were silent on the subject, judges were soon found claiming the power of pronouncing legislation void because in conflict with the constitution under which it was enacted. Virginia and New Jersey courts began to take to themselves this authority in 1778 and 1780, and in the memorable case of Trevett *v.* Weeden a Rhode Island court declined, in 1786, to enforce a statute laying a penalty for refusing to accept paper money at its face value, on the ground that the law was unconstitutional and void.[2] The right of the courts to do this was questioned at the time, and still more after 1789. But at all events the actions taken emphasized in a wholesome manner the supremacy of the constitutions as bodies of fundamental law and the obligation of the legislatures, no less than of the governors, to keep within the limits of power prescribed for them.

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[1] The constitution of Massachusetts authorized the legislature to consult the judges in advance on a proposed measure, but said nothing about action by the judges after the measure was on the statute book.

[2] For the argument in this case see J. B. Thayer, *Cases in Constitutional Law*, I, 73-78. Cf. E. S. Corwin, "The Establishment of Judicial Review," *Mich. Law Rev.*, IX, 102-125, 283-316 (Dec., 1910, and Feb., 1911).

CHAPTER X

THE ARTICLES OF CONFEDERATION

Inadequacy of the Continental Congress

The Continental Congress was of great service to the Americans in carrying on the war. It raised armies, appointed generals, managed foreign relations, arranged the French alliance, advised the states on the making of their new constitutions, and in other ways led and served the cause. It was, indeed, the only common organ of consultation and of non-military action. Even for war purposes, however, the Congress was gravely defective, and as an instrumentality of government it was, in the long run, impossible. In the first place, it had no legal basis. It began as a mere voluntary conference for the discussion of grievances and remedies; it had no sanction in British instructions and regulations; and after independence, as before, it rested on no constitution and commanded support only as an extra-legal, revolutionary body.

Sovereignty of the states

From this it follows that the Congress had no powers except such as it assumed, or, at the most, such as the people and their governments in the several states informally consented to permit it to exercise. Historians and constitutional lawyers, it is true, are not agreed upon what actually happened when independence was declared. Some consider that the very act of breaking the bonds which united the thirteen colonies with Great Britain threw down the barriers separating them one from another and merged them into one sovereign nation, with the Congress as a legal organ of a united authority.[1] But there is no evidence that contemporaries viewed the matter in this way. On the contrary, they plainly conceived of the thirteen colonies as having become so many independent, sovereign political areas, *i.e.*, states, in the full meaning of the term. For war purposes, these states did, indeed, maintain certain machinery in common, chiefly the Congress and the armies. Legally, none the less, each state had unrestricted powers of self-government, and was entitled to resume complete independence of action at any time that it desired. The Congress was made

[1] J. W. Burgess, *Political Science and Constitutional Law*, I, 100; H. von Holst, *Constitutional History of the United States*, I, 8.

up of delegates who, in effect, sat as ambassadors; their votes were the votes of states, and, logically enough, were cast in indivisible blocks, so that each state had one vote. The states constantly asserted and exercised their sovereignty, even going so far as to carry on occasional negotiations with European powers in disregard of the foreign policies of the Congress. All were inclined to consider the Congress a temporary expedient; Pennsylvania and North Carolina provided in their new constitutions for sending delegates only "as long as such representation shall be necessary."[1]

Need of a stronger union

Experience soon proved, however, that a simple league, on these lines, was totally inadequate. The war promised to last for many years and to demand every ounce of strength that the people could muster; finance, commerce, foreign relations, military and naval operations, called for management at the hands of a government resting on some legal basis, formally endowed with powers, and assured of some degree of permanence. From these practical needs sprang the idea of a real and lasting union of the states—in other words, that spirit of American nationality which gradually broadened and deepened until it found expression, on the political side, in the Articles of Confederation, the constitution, and ultimately the vast and complicated mechanism of national control which we know today as the government of the United States.

Obstacles to union

Notwithstanding the obvious advantages of closer union, the building of the American nation was, however, a gigantic task, which, in the nature of things, had to be accomplished slowly. The jealousies and suspicions of colonial times were not dropped when the war broke out, or when independence was secured. On the contrary, they were in most cases intensified; and many new sources of friction appeared. Even after the union had taken on presumably definitive form under the constitution, the question of the distribution of powers between the national government and the states produced controversies which in a few decades brought the country to civil war. From whatever point of view considered, the transition from the Continental Congress to the government under the constitution, accomplished as it was within the space of hardly a dozen years, was a remarkable political achievement.

On June 7, 1776, Richard Henry Lee, of Virginia, introduced in Congress his famous resolution declaring the colonies "free and independent states" and at the same time moved the appointment of a committee to draw up "articles of confederation." Scattered

[1] C. H. Van Tyne, *The American Revolution*, 178.

CHAP. X

The Declaration of Independence and the Articles of Confederation

proposals looking in these directions had hitherto attracted little support; a new plan of union offered by Franklin on July 21, 1775, had been easily crowded off the calendar by other business. Congress had now, however, come to the point where it could no longer evade or postpone either issue. Hence on June 11 a committee was appointed to draft a declaration of independence, and on the following day another to draw up a plan for a more substantial union. The result in one case was the Declaration of Independence, adopted by Congress on July 4; in the other, the preparation of the first constitution of a united America, *i.e.*, the Articles of Confederation.

The Articles ratified

The committee on union found two carefully thought out schemes ready for its consideration. One was the plan offered the year before by Franklin; the other was a device drafted by John Dickinson, of Delaware, who was himself a member of the committee. This expedited the work, and on July 12 the committee reported to Congress a plan which bore evidence at every point of having been framed with a view to persuading the mutually jealous states, especially the smaller ones, that they could enter the union without yielding powers and rights which they considered essential to their well-being. Even so, the process of adoption was slow and arduous. After a few weeks of discussion, Congress put the project entirely aside until the next spring in order to give the states a chance to consider it. Not until November 15, 1777, could the instrument be finally got through; and since by its own terms it could not take effect until ratified by every one of the states, other and yet longer delays ensued. Eleven states ratified within about a year. But Delaware held back until 1779, and Maryland until 1781. The new plan, therefore, went into operation on March 1, 1781, three and one-half years after Congress adopted it. By that time the war which had called it into being was fast approaching an end.[1]

Continued sovereignty of the states

Under the Articles the United States had for the first time a government resting on a written constitution and endowed with a reasonably definite body of powers—a government which, it must not be forgotten, was considerably superior to the extra-legal Continental Congress, even though it, in its turn, proved inadequate and had to be discarded. Four main features distinguished it. The first was the unimpaired sovereignty of the states. "Each

[1] The text of the Articles is printed in W. MacDonald, *Select Documents Illustrative of the History of the United States, 1776-1861*, 6-15.

state," says Article II, "retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled." As we shall see, men differed widely in earlier times on the question of whether the states were sovereign under the present constitution. But the situation under the Articles was never in doubt. The states delegated to the national government the right to exercise certain powers and denied certain powers to themselves. But they retained full sovereignty over their own citizens; the union was only a loose confederation, or league; and, notwithstanding that the Articles spoke of it three times as "perpetual,"[1] the members plainly regarded themselves as able to withdraw if they desired.

Lack of direct power over individuals

A second main feature followed naturally from the first: the government of the Confederation had no contact with individuals, but operated exclusively upon the states. It could not, for example, tax private property in order to meet its expenses; it could only make requisitions upon the states for funds, in proportion to land values, and the states were free to raise the money in any way they chose. The central government could not reach down past the state governments to control the people in any manner. Aside from a provision for the extradition of fugitives from justice, a guarantee of mutual recognition of "the privileges and immunities of free citizens in the several states," and a pledge of freedom of interstate migration, trade, and general intercourse,[2] the Articles contained, indeed, nothing of importance relating to the individual as such.

The Congress

A third feature was the simplicity, not to say meagerness, of the machinery of government. The management of the country's general interests was entrusted to a unicameral Congress, meeting annually and composed of delegates appointed in each state in such manner as the legislature thereof should direct. Each state paid its own delegates, and could recall them and appoint others at any time within the year; and no person could serve more than three years in any six. A state could send any number of delegates from two to seven. But voting, as in the Continental Congress, was by states, and each state had one vote.[3] All functions and powers of the general government were gathered in the hands of this Congress and its committees. As an aid to the transaction of business, the

[1] In the Preamble and twice in Art. XIII.

[2] Art. IV.

[3] If the delegates were equally divided on a question, the vote of the state was lost.

IAP.

delegates could elect one of their number president. But the person so chosen was only a moderator, or chairman, and had no independent executive powers whatsoever. Congress was itself, indeed, rather an executive than a legislative body. During the intervals between its sessions it could delegate a limited control of affairs to a "Committee of the States," composed of one member of Congress from each state; and it could at any time appoint such other committees and civil officers as were considered necessary. But there was no separate executive branch. Likewise, there was no federal judiciary.

Powers and limitations

The functions and powers of the general government were, therefore, identical with the functions and powers of Congress; and a fourth feature of the system was the rigid limits set for these powers. The powers conferred were mainly, as has been said, executive in character. Congress was to manage foreign relations, declare and conduct war on land and sea, build and equip a navy, carry on dealings with the Indian tribes, borrow money, emit bills of credit, regulate weights and measures, and issue requisitions upon the states for soldiers and for funds. The grant of these and a few other powers to Congress involved some real concessions on the part of the states, and public sentiment was not as yet prepared to go farther. Measured, however, by the needs that arose, these powers were very inadequate. In the first place, certain powers which are fundamental to all government were not conferred at all. One of these was the power to raise money by taxation. Congress could call upon the states for funds, but only the state legislatures could tax. Another hardly less necessary power which was withheld was that of laying tariff duties and otherwise regulating commerce.

In the second place, most of the important powers conferred could be exercised only with the assent of nine of the thirteen states. This number must agree before war could be declared, treaties concluded, money coined, estimates of expenditures prepared, funds borrowed, or decisions reached on the number of land or sea forces to be raised. A handful of delegates from five states, although representing a small minority of the country as a whole, could, therefore, block measures of the most urgent nature.

Inherent weakness

Furthermore, Congress lacked independent power to enforce its measures. It had no money and no soldiers except such as the states chose to provide; there were no courts, except those of the states, through which it or its agents could compel respect for its

authority. It could pass resolutions; but it could not make law, in the proper sense of regulations backed by a power of enforcement. It could make up a list of citizens from which seven or nine arbiters should be designated, partly by lot, to look into disputes between two or more states; but there was no way of enforcing the findings arrived at. It had reasonably broad executive powers; but it could exercise few of them without the consent of nine states, and it could not go far in any direction without the funds which it could only ask, not compel, the states to provide.

The Articles put into effect

In the three and one-half years between the adoption of the Articles by Congress and their ratification by Maryland the country gained a great amount of political experience, most of which went to indicate, in the judgment of such men as Washington and Robert Morris, that the Articles would hardly stand the test of practical use. Indeed, Hamilton and others urged a revision before the experiment was tried. On March 1, 1781, however, the long-suspended frame of government went into operation in the form in which it came from the hands of Congress. The effect was a momentary toning up of the management of public affairs. The new Congress, while not a distinguished body, was superior to its predecessor, and it gave all the force and ability that it had to the performance of its multifold duties. Taking over a plan worked out by the preceding Congress in its expiring moments, it provided for four executive officers, or heads of departments,—a superintendent of finance, a secretary of foreign affairs, a secretary "at war," and a secretary of marine; and, though handicapped by lack of funds and of powers, these agencies did some good work and became the prototypes of the ten great executive departments at Washington today.[1] In the teeth of grave obstacles, the new government kept the armies equipped and in the field until peace was assured. It sent astute commissioners who procured from Great Britain full recognition of American independence and beat the double-faced diplomats of France and Spain at their own game. It took up the question of organizing and developing the territories west of the Alleghanies and adopted principles and measures which underlie the governmental and educational systems of that part of the country today.[2] It held the thirteen jealous states together while the people were gradually being brought by hard

Achievements of the new government

[1] J. C. Guggenheimer, "The Development of the Executive Departments, 1775-1789," in J. F. Jameson, *Essays in the Constitutional History of the United States* (Boston, 1889), 116-185.

[2] Notably the Northwest Ordinance of 1787.

CHAP. X

experience to see that what they needed was more union rather than less, or, as some had thought, none at all.

Need of money

The embarrassments, disorders, and dangers of the years covered by the Confederation—years aptly termed the "critical period"—are described in numerous excellent books[1]; manifestly the story cannot be told here. The Articles, as many had feared, proved a very unsatisfactory frame of government. Four main difficulties appeared. The first was the lack of power to raise money. Never, perhaps, did a government stand in greater need of generous funds. The cost of the war had been met mainly by domestic and foreign loans; but interest payments were far in arrears, and the public credit threatened to be completely extinguished unless the holders of securities soon received some part of what was due them. The officers and soldiers, who in many cases had received nothing for their services except certificates of indebtedness, were now clamoring for their money. A new army was urgently needed to repel possible British or Spanish attacks and to hold the Indians in check, and a navy to protect American commerce from the depredations of the Barbary pirates. On top of these and other obligations and needs, the current expenses of the new government were to be provided for.

Difficulty of obtaining it

Congress had but two ways of obtaining funds, namely, by borrowing and by making requisitions on the states. The possibilities in the first direction were already nearly exhausted; although optimistic Dutch bankers continued to make small loans which quite possibly saved the country from utter bankruptcy. Requisitions upon the states were likewise extremely unreliable. Congress could apportion sums and request payments, but it had no means of compelling a state to turn over a single penny. The basis of apportionment of quotas among the states, *i.e.*, the value of land and improvements, was considered unjust by large numbers of people. Dislike of sending off the proceeds of local taxation to a distant government, coupled with a natural hesitation to meet obligations in full while other states were shirking them, strongly disinclined the governments and peoples of the several states to comply with the requests that came to them.

Relief measures defeated

The result was that, after a brief period, some states fell into the habit of contributing hardly anything, others paid irregularly, and only two or three—chiefly New York and Pennsylvania—made

[1] In most readable fashion in John Fiske, *The Critical Period* (Boston, 1888), although this account is not entirely free from errors of detail.

any real effort to come forward with all that was asked of them. It is not to be wondered at, therefore, that the arrears of interest on the domestic debt increased almost four-fold, and on the foreign debt about twenty-five fold, during the brief period 1784-89; or that the general government found itself without the means of meeting even current expenditures regularly and promptly. In February, 1781, even before the Articles went into effect, Congress asked the states for the power to levy a five-per-cent import duty. Rhode Island, however, was unwilling, and the proposal failed. Again in 1783 Congress sought permission to levy certain duties, whose proceeds were to be applied exclusively to the public debt. But in three years only nine states gave their consent, and a fresh appeal in 1786 failed to win New York.

Depreciated paper currency

Nothing was to be gained by issuing paper money. The country was already flooded with paper promises to pay, issued as an aid to financing the war, and this "continental currency" had so depreciated that by 1781 practically the only people willing to accept it were speculators, who bought and sold it in bundles at rates varying from five hundred to one thousand dollars in paper for one dollar in gold. A pound of tea cost a hundred dollars, a yard of linen seventy-five dollars; Jefferson's account-book shows that he paid his physician three thousand dollars for two calls. To make matters worse, the states went on issuing paper with no specie basis whatever. Obviously, it would have been idle to expect new issues of federal notes to be received as real currency.[1]

Inability to regulate commerce

A second main defect of the system was the lack of power in Congress to regulate commerce. Congress was permitted by the Articles, it is true, to regulate trade with the Indian tribes and to conclude treaties of commerce with foreign nations. But it had no power to control commerce between the states; it could not lay duties on exports or imports; and it was bound to allow the states to lay duties, and even to prohibit the exportation or importation of goods, as they severally desired. The consequences were disastrous. No money could be raised from tariff duties. No uniform commercial policy could be adopted. The states laid duties, gave privileges, and set up barriers as their own immediate interests dictated, and by their jealousies and bickerings they sacrificed opportunities for the advancement of the country's general

[1] The financial situation in the period is clearly described in A. C. McLaughlin, *The Confederation and the Constitution*, Chap. IV, and more fully in C. J. Bullock, *The Finances of the United States, 1775-1789* (Madison, 1895).

CHAP. X

trade and wealth. When, for example, three of the New England states practically closed their ports to British shipping in order to bring about a relaxation of certain British commercial restrictions, Connecticut immediately threw her ports wide open to all British vessels. Pennsylvania discriminated against Delaware and New Jersey, who promptly retaliated; Maryland tried to deflect the commerce of Virginia to her own ports; New York laid ruinous burdens on the trade of her maritime neighbors, New Jersey and Connecticut. Enmeshed in a network of duties and tolls, trade languished; healthy commercial competition gave way to sheer commercial warfare.[1]

A government of states and not of men

Lack of power to raise money by direct action and to regulate commerce on uniform lines would have been enough to insure the failure of the new government, even if conditions in other respects had been far more favorable than they were. But coupled with these disadvantages were two other more general and fundamental defects: (1) the government of the Confederation rested entirely upon the states and not upon the people, and (2) it was wholly without power to enforce its authority, even upon the states. From the first circumstance flowed many unhappy results, in addition to the inability that has been mentioned to lay and collect taxes by direct authority. Congress could not make laws and enforce them upon the people; it could only pass resolutions, advise and admonish the state authorities, and hope that the states would carry out its will. It had no power to raise armed forces independently, even when, as during the Shays rebellion in Massachusetts in 1786, the new order was beset by forces of discontent that would have overthrown it. "The great and radical vice in the construction of the existing Confederation," Hamilton did not hesitate to affirm, "is the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist."[2]

State infractions of the Articles

The crowning difficulty was the inability of the general government to compel the states to meet their obligations and, in general, to live up to the terms of the constitution which they had more or less reluctantly ratified. Not alone did they fail to comply with requisitions for money and for armed forces. They, or some of them, violated the Articles by making treaties with Indian

[1] On the disordered state of commerce under the Articles see A. C. McLaughlin, *ibid.*, Chap. v, and J. Fiske, *Critical Period*, Chap. iv.

[2] *The Federalist*, No. xv (Lodge's ed., 86).

tribes, by entering into alliances among themselves without the assent of Congress, by ignoring obligations created by treaties negotiated by Congress, by (in effect) regulating the value of money through making their paper issues legal tender. Congress was powerless to prevent these infractions by military, judicial, or other means, and its moral authority carried little weight. In the final analysis, the union was, as Madison declared in 1789, "nothing more than a treaty of amity, of commerce, and of alliance between independent and sovereign states."[1] It was a failure, Washington tersely remarked, because of the "absence of coercive power."

Early proposals for a revision of the Articles

It has been pointed out that even before the Articles took effect men who had the country's welfare at heart felt that a government so devoid of power could not succeed. The most they could hope for was that a brief trial of the new plan would convince the people of its inadequacy and would lead to the stronger system from which the states at present drew back. In 1780 Hamilton, in a remarkable letter addressed to James Duane and intended for the use of a committee of Congress which was charged with preparing a plan for executive departments, lucidly discussed the Articles' faults and proposed that a general convention be called to prepare a frame of government providing for a "solid coercive union."[2] Washington, Madison, Jay, Pelatiah Webster, and other leaders repeatedly affirmed that the government would have to be strengthened, and in 1782 the assembly of New York added its voice in favor of a convention.

Consideration of the matter in Congress

When Congress took up its stupendous task, the difficulties that had been predicted promptly appeared; yet its urgent requests for more financial power, and for increased authority in one or two other directions, were refused. These requests involved, indeed, only slight changes in the Articles. But amendments could be adopted only with the assent of all of the states; and one or more states blocked every proposal. Throughout 1784 members of Congress occasionally discussed among themselves the wisdom of calling a convention,[3] and in the following year the Massachusetts General Court formally requested that such a call be issued, although the state's representatives in Congress refused to present the resolution. Matters were fast going from bad to worse, and in

[1] *Writings* (Hunt's ed.), II, 363. See the notable criticism of the Articles contained in this paper.

[2] *Works* (Lodge's ed.), I, 213-239.

[3] *Writings of Madison* (Hunt's ed.), II, 99-100.

1786 Congress, in making a final appeal for the financial amendment proposed three years earlier, told the people of the states frankly that the government was at the end of its tether and that only immediate action could save the country from ruin. "A crisis has arrived," it was solemnly asserted, "when the people of the United States, by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether, for the want of a timely exertion in establishing a general revenue and thereby giving strength to the Confederacy, they will hazard not only the existence of the Union but of those great and invaluable privileges for which they have so arduously and so honorably contended."

Virginia and Maryland negotiate on the navigation of the Potomac

Meanwhile a chain of events was started which led, more or less accidentally, to the long-talked-about convention. From as far back as 1777 Virginia and Maryland had been trying to arrive at an understanding regarding the navigation of the Potomac. Washington and Madison were especially interested in the matter, and at their instigation Virginia appointed commissioners in 1784 to renew the negotiations. Maryland took similar action in 1785, and an agreement was promptly reached. Maryland thereupon suggested that other issues between the two states be taken up. If navigation questions could be settled by conference, why not tariff difficulties? Furthermore, if two states could confer to advantage, why not four—especially in view of the fact that Pennsylvania and Delaware were vitally concerned in most of the problems to be considered? The upshot was that, in January, 1786, Madison got through the Virginia legislature a resolution appointing commissioners to meet such commissioners as might be appointed by other states to take into consideration the trade of the Union and "to consider how far a uniform system in their commercial regulations may be necessary to their permanent harmony."[1] A formal invitation was thereupon issued to all of the states to send delegates to a convention to be held at Annapolis in the following September.

The Annapolis convention, 1786

At the appointed time representatives appeared from only five states. Four other states had, indeed, appointed delegates, who failed to attend; four states took no notice of the call. This was a discouraging beginning, and it was agreed that it was useless to enter upon the discussions that had been intended. Some members felt that the project might as well be dropped. Madison and

[1] *Writings of Madison* (Hunt's ed.), II, 218.

Hamilton, however, thought otherwise, and before disbanding the delegates unanimously adopted a report prepared by the latter calling attention afresh to the critical situation of the country and proposing that a convention of delegates, from three to seven in each case, from all of the states should meet at Philadelphia on the second Monday of May, 1787. The purpose, furthermore, was no longer merely to achieve uniformity of commercial regulations. Rather it was "to take into consideration the situation of the United States," with a view to such general reconstruction as would make the government adequate; although the report naturally did not stress the amount of change that this might be found to entail.

The Philadelphia convention called

Congress was by this time grasping at straws, and on February 21, 1787, it resolved that the proposed convention should be held "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the federal constitution adequate to the exigencies of government and the preservation of the Union."[1] Congress had fallen into general disrespect. But the activities of Washington, Madison, Hamilton, Franklin, and others in behalf of the plan carried weight, and all of the states except Rhode Island eventually followed Virginia's example and named delegates, although New Hampshire failed to act until the convention was well under way. In some cases the legislatures elected, in others they authorized the governors to appoint; in no instance were the delegates chosen directly by the people. Little or nothing was said about making a new constitution. The instructions given the delegates plainly assumed that nothing would be done beyond revising the Articles; indeed, in most cases they expressly limited the delegates' powers to this task, and Delaware went so far as to forbid her representatives to agree to any proposal which would take away the equal votes of the states. If any people expected a new constitution to be made—and probably some did so—they discreetly kept their hopes to themselves, lest apprehensions be aroused and the project ruined. Most observers must, none the less, have felt with Madison that unless "some very strong props" were applied the existing union would "quickly tumble to the ground."

[1] J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, 1854), I, 120.

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CHAPTER XI

THE MAKING OF THE CONSTITUTION

Membership of the Constitutional Convention

The convention was announced to meet on the second Monday of May. But when that day arrived only a few delegates had appeared in Philadelphia, and since it was useless to begin until a majority of the states were represented, the opening session was delayed until May 25. Much has been written to the general effect that the convention brought together a remarkable group of men; and there is no denying that it did so. The group was notable, however, not for a uniformly high level of statesmanlike ability, but rather for its varied, and therefore broadly representative, character. There were members of great political sagacity: Washington and Madison of Virginia,[1] Franklin and James Wilson of Pennsylvania, Alexander Hamilton of New York, John Dickinson of Delaware, Oliver Ellsworth of Connecticut. There were delegates of fair, but not exceptional, ability: Rufus King of Massachusetts, Gouverneur Morris of Pennsylvania, William Paterson of New Jersey, Edmund Randolph of Virginia, the two Pinckneys of South Carolina. And there were a few members of narrow vision and mediocre talent: Lansing and Yates of New York, and Luther Martin of Maryland. Lawyers predominated; and several of the delegates were reasonably well acquainted, not only with the history of English law and politics, but with the governmental systems of continental Europe. Men of age and maturity were present, notably Franklin, who was almost eighty-two. But a large proportion of the most active and influential delegates were decidedly young: Madison, the master-builder, was thirty-six, Gouverneur Morris was thirty-five, Hamilton was but thirty.

Experience and temper of the delegates

The convention's chief qualification for its task lay, however, in the fact that almost without exception its members were experienced in public affairs. Practically all of them had been active in the politics of their respective states. Many had helped frame constitutions, sat as members of legislatures, or held executive or

[1] Jefferson was on a diplomatic mission in Europe; otherwise he would undoubtedly have been a member.

CHAP. XI

judicial offices. Several had been members of Congress. At the same time, it is to be observed that they were not the radicals who had had most to do with bringing on the Revolution and with declaring independence. Patrick Henry was not there, nor was Samuel Adams. The men who now held the country's political destinies in their hands were not of the doctrinaire type. Rather, they were hard-headed, practical-minded people—men, in the main, of property and of the conservative temper that goes with the possession of property. Few were as conservative as Hamilton, who wanted to see a highly centralized and somewhat aristocratic republic set up. But there was far less regard for political abstractions than among the earlier preachers of revolution, and doubts about the efficiency of political democracy, which most members held and some openly avowed, left a deep impress on the constitution as it came from the convention's hands.[1]

Organization and procedure

The sessions were held in the old brick State House in Philadelphia, probably in a room directly above that in which the Declaration of Independence was signed. Seventy-three delegates, in all, were appointed, but only fifty-five ever attended; of these, some were present only part of the time, and the average attendance seems to have been not above thirty or thirty-five. At the opening meeting Washington was unanimously chosen to preside. This prevented him from taking an active part in the debates. Indeed, so far as is known, he addressed the convention only once, at the opening of the sessions. With the possible exception of Franklin, he, however, was less dependent on oratory as a means of influence than was any other member. He performed his duties as moderator in a fashion to allay strife, and through informal channels his advice was always available.

The convention had full power to make its own rules. It promptly decided to adhere to the plan of voting by states, each state having one vote, as in Congress; and also to protect the members from outside criticism and pressure by sitting behind closed doors and by allowing nothing that was said to be printed or otherwise made public during the continuance of the sessions. A secretary was appointed, and a journal was kept. When, however, in 1818, this record was printed by order of Congress, it proved to be only a bare enumeration of formal motions and of

[1] The members are briefly characterized, one by one, in M. Farrand, *The Making of the Constitution*, Chap. II, and their economic interests and political ideas are described in C. A. Beard, *Economic Interpretation of the Constitution*, 74-149, 189-216.

the votes by states.[1] Happily, one member, sensing the full importance of what was being done, planned to keep a record on his own responsibility. This was Madison. Fragmentary memoranda were left by a few other members, and something can be learned from letters written by certain delegates to their friends. But what we know today about the convention's discussions, as distinguished from its formal actions, comes mainly from the "Notes" laboriously prepared by the methodical Virginian.[2]

The convention's main problem

Deliberations had not gone far before the delegates were brought face to face with a very vital question. Should they merely revise the Articles of Confederation, or should they make a new constitution? There was no getting away from the fact that their instructions looked simply to revision, and that the plan for a convention would have failed had the people of the states suspected that more drastic action would be taken. On the other hand, many thoughtful persons sympathized with Washington when he confessed the hope that the convention would "adopt no temporizing expedients," but would "probe the defects of the constitution [*i.e.*, the Articles] to the bottom and provide a radical cure, whether they are agreed to or not."[3] Both points of view were strongly represented in the convention, and a plan based on each was early presented for consideration.

The Virginia plan

The first scheme to appear came logically from Virginia. That state had taken the initiative in causing the convention to be held, and its delegates felt themselves under a certain obligation to have a concrete project ready for discussion. The delay in the assembling of a quorum gave them an opportunity to meet together for some days, and it was in these conferences that the "Virginia plan" first took definite form. Madison was its real author (although Edmund Randolph presented it to the convention), and it represented the best thought of the convention's ablest student of political, and especially federal, institutions. The plan did not avowedly repudiate the Articles. But it looked to a thorough reconstruction of the system of government for which they provided, and the fiction that a mere revision was intended was soon dropped. A national executive was to be established, and also a national judiciary with somewhat limited jurisdiction. There was to be a legislature in two branches, the members of the

[1] For the Journal, see *Documentary History of the Constitution*, I, 48-308.

[2] First published in 1840. Of several editions, the best is in *Writings of Madison* (Hunt's ed.), III-IV.

[3] *Writings of Washington* (Ford's ed.), XI, 134.

CHAP. XI

first branch being chosen by the people of the several states and the members of the second branch being selected by those of the first from persons nominated by the state legislatures. Voting was to be proportioned in both houses, either to the quotas of contribution or to the number of free inhabitants, or to both. The legislative powers of Congress were to be increased, and the national government was to have the right to veto state legislation when considered contrary to the Articles or to a treaty, and to call forth the militia against any member of the union "failing to fulfil its duty." Presented by Randolph on May 29, in the form of fifteen resolutions, this plan gave the convention something to go to work upon at once; and for two weeks the delegates steadily debated it, and questions arising out of it, in committee of the whole.[1]

The New Jersey plan

The Virginia plan contemplated a greater change in the machinery of the general government than in its powers. None the less it provided for a substantial increase of powers; and it proposed to substitute proportional for equal voting in Congress. Strong objection therefore arose from the members who were most attached to the "rights" of their states; and when the larger part of the Virginia plan was tentatively voted in committee of the whole, these elements decided to present a counter-plan, based on a "purely federal" principle. This alternative scheme, embodied in nine resolutions, was laid before the convention on June 15 by William Paterson, of New Jersey. Far from discarding the Articles, as the Virginia plan in effect did, the New Jersey plan looked merely to amendment of them in a degree sufficient to remedy the most glaring defects of the existing system. There was to be an executive in the form of a council chosen by Congress, and a national judiciary consisting of a "supreme tribunal." Congress was to have power to raise money from duties on imports and from stamp taxes, and to regulate commerce; and its acts were to be "the supreme law of the respective states." But the equality of the states for governmental purposes was to remain inviolate: Congress was still to consist of a single house, in which each state should have one vote.

The New Jersey plan was ably advocated by Paterson and other members, and it enlisted the support of about half of the states.

[1] On the same day on which the Virginia plan was presented Charles Pinckney, of South Carolina, offered a plan of his own. It was broadly similar to the Virginia scheme and was not discussed in detail by the convention.

Its presentation, indeed, split the convention into two distinct parties, one representing the large states and the other the small states. One group wanted political power proportioned to the ability of the states to aid in bearing the public burdens, and was not afraid of a real national government; the other held that the states, as sovereigns, were equals, and that to give up the right to equality of governmental power would mean for the small states a total subordination to their more populous neighbors. Fortunately, it was not necessary that either party should have its way at all points; else no conclusions could ever have been arrived at. The delegates were, after all, practical-minded patriots, accustomed in their business relations and in their home politics to the saving principle of give and take. They set forth their widely divergent views on the floor of the convention freely and sometimes acrimoniously. But, having done so, most of them were not averse to compromise; and the constitution upon which they finally came together was, in almost every important clause, a product of mutual concession.

Compromise the only solution

Fortunately, however, compromise did not enter in until after certain vital decisions had been reached. The most important of these was to cast aside the Articles and to establish a government resting on a broadly national basis. Some delegates were of the opinion that the instructions given by the states were binding, and that if the convention wanted power beyond the simple revision of the Articles its members ought to go back to their states and ask for it. But the majority were, as Randolph later put it, "not scrupulous on the point of power," and felt, as he further testified, that "when the salvation of the republic was at stake it would be treason to our trust not to propose what we found necessary."[1] Within five days after the opening of the sessions a resolution was adopted in committee of the whole "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary"[2]; and Madison, Hamilton, and other delegates made it perfectly clear that this meant a government embodying one supreme power, with "complete and compulsive operation." The small-state elements protested and declared that they would have no part in such a union; the large-state delegates asserted that they would accept nothing less. The small-state people brought forward the New Jersey plan; yet at the final test only three states voted for it. From first to last—sometimes at the risk

Decision in favor of a strong national government

[1] J. Elliot, *Debates*, V, 197.

[2] *Ibid.*, V, 134.

CHAP. XI

of breaking up the deliberations—the initial decision was wisely adhered to.

From this decision flowed, too, certain great corollaries: (1) the powers of the general government should be decidedly increased; (2) the machinery of government should be enlarged, as indeed was proposed in all of the plans submitted for the convention's consideration; (3) the general government, equally with the state governments, should operate directly on the people, through its own laws, administrative officers, and courts; and (4) the new constitution should be "the supreme law of the land," enforceable in the courts like any other law and prevailing as against all other constitutions, laws, and actions, national or state, found to be inconsistent with it. All of these were momentous decisions, and all lie to this day at the basis of our governmental system.

The national government to be a "government of men"

The third decision, in particular, quite transformed the character of the national government. Instead of resting solely upon the semi-independent states, and having no control over the people except through the medium of the state authorities, that government now became a government of men, with power to levy and collect taxes and to make and enforce laws by its own direct action. Henceforth, as James Wilson pointed out to the convention, over each citizen there were to be two governments, both "derived from the people," both "meant for the people," and both operating by an independent authority upon the people. It was this aspect of the new system, as Madison subsequently explained in a letter to Jefferson, that made it possible to leave out of the constitution any provision authorizing the central government to call forth the armed forces against a delinquent state.[1] Each of the three principal plans presented to the convention had, in one form or another, proposed coercion of delinquent states. But when it was decided to create a central government that would have power to proceed directly against individual citizens, it was perceived that this opened a way to the desired end through the simple enforcement of law, and made unnecessary a very difficult decision on the form which state coercion should take. Thus it came about that the Civil War was waged on the theory that the object was to suppress rebellion on the part of citizens, not of states as such; although this distinction was largely lost sight of in the era of reconstruction.

[1] *Madison's Letters* (ed. of 1865), I, 344.

The great compromises:

These fundamentals settled, the large-state party was prepared to make concessions. The first and most notable one related to the composition of Congress. The large states wanted representation according to population; the small states asked equal representation; spokesmen of each group threatened more than once to withdraw unless their wishes in the matter were met. At a very critical point in the proceedings the delegates from Connecticut—a middle-sized state which was firmly attached to the idea of a stronger union—brought forward a proposal for equal representation in the upper house, combined with representation on a proportional basis in the lower house; and after heated debates the deadlock was broken and the compromise was adopted, although grudgingly on the part of most of the large-state representatives. This disposition of the matter was suggested early in the proceedings and did not originate with the Connecticut delegation. Dr. Johnson and his colleagues deserve credit, however, for putting it formally before the convention with an array of unanswerable arguments, and the agreement has ever since been properly known as the "Connecticut compromise." It removed the greatest single obstacle to concord that the convention encountered.

1. The "Connecticut compromise"

2. The three-fifths clause

The decision in favor of proportioned representation in the lower house, however, made it necessary to determine how population should be computed. The difficulty at this point was caused by the slaves. Should they be regarded as persons or as chattels? If the one, they ought to be counted in; if the other, they ought to be left out. With a view to increasing their quotas in Congress, the southern states naturally wanted the slaves counted; the northern and middle states, having few slaves, quite as naturally wanted them left out; and much strong-toned discussion ensued. A possible solution was, however, already in men's minds when the convention met. When asking the states for additional funds in 1783 Congress had proposed to change the basis of apportionment from land values to numbers of population, in which three-fifths of the slaves should be counted. This "federal ratio" was early added as an amendment to the Virginia plan; it was embodied in the New Jersey plan; and, notwithstanding individual differences of opinion, it was ultimately adopted by the convention as being, in the words of Rufus King, "the language of all America." There was no defense for it in logic. But it was the closest approach to a generally satisfactory arrangement that a body of practical-

CHAP. XI

minded men could discover. The slave states received less representation than they thought their due. But they found compensation in the provision that direct taxes laid by Congress should be apportioned on the same reduced basis as representation; although, as a matter of fact, direct taxes were actually employed by the national government only three times before slavery was abolished.

3. Commerce and the slave trade

Still another compromise pertained to the powers of Congress over commerce. The states north of the Potomac had large commercial interests, and, having suffered most from the commercial anarchy of the Confederation period, they wanted Congress to have substantial power to regulate trade and navigation. The four states farther south, however, were agricultural, and their delegates feared that Congress would levy export duties on southern products and in other ways discriminate against the non-commercial section. Furthermore, there was the question of the slave trade. The northern states would have been willing to see the traffic abolished immediately, and Maryland and Virginia, being well stocked, had no great interest in it. But Georgia and the Carolinas considered it necessary to their economic development, and the convention was flatly told that these states would never accept the new plan "unless their right to import slaves be untouched." The upshot was an agreement which placated all elements. Congress was to have general powers to regulate navigation and foreign trade, including power to lay duties on imports. But duties on exports were forbidden, and the importation of slaves was not to be interfered with by the central government (except to the extent of a head-tax not exceeding ten dollars) prior to the year 1808.

The instrument completed

Many other important matters claimed the attention of the delegates through the sultry mid-summer days during which the convention patiently pursued its labors. The nature and powers, and especially the mode of selection, of the executive absorbed much time and thought, the more by reason of the fact that plans gradually took form for a chief executive different from any that the world had ever known. The manner of electing senators—whether by the people, by the state legislatures, or by some agency specially constituted for the purpose—proved very difficult to decide. The appointment and status of the national judiciary yielded ardent discussion. The powers to be vested in Congress, the mode of admitting new states, the control of the national government over the state militia, the manner of amending the new constitution—

these and a score of other matters demanded and received painstaking consideration. From first to last the Virginia plan, and amendments to it, formed the chief basis of discussion. First, the essentials of this plan, as embodied in the Randolph resolutions, were threshed out in committee of the whole. Then, after being reported back to the convention considerably amplified and amended, they were again debated in full. Next, the enlarged and extended resolutions that resulted from this process were turned over, near the close of July, to a committee of detail, which worked them out into a balanced constitutional text; and the convention spent upwards of six weeks more in discussing this draft. Finally, Gouverneur Morris wrote out with his own hand the completed instrument, casting it in the lucid English for which it has ever been notable among great documents; and on September 17 thirty-nine members signed it.[1]

The main test was yet to come. The convention had ignored the instructions given most of its members and instead of patching up the Articles had prepared a great organic law on wholly different lines. Would the people of the states approve what had been done? Even the members of the convention were not very enthusiastic over their handiwork. Three of those who were present when the document was signed refused to put their names to it. Of the twelve active members who were absent, some hastened to their homes to take up the fight against ratification. Of the men who signed, few, if any, were wholly satisfied: Franklin was optimistic, yet he confessed to misgivings; Hamilton admitted that he signed mainly because he considered that the new frame of government could not prove less satisfactory than the existing one.

Plans for ratification

In laying the results of its labors before Congress the convention made two significant recommendations. The first was that the proposed constitution should be submitted in each state to a convention chosen by the people, and the second was that steps should be taken to put it into effect whenever as many as nine states should have acted favorably upon it.[2] The object of the first proposal was, as Hamilton explained, to give the instrument a more popular basis than would arise from ratification by the state legislatures[3]—a

[1] The monumental collection of sources on the work of the convention is M. Farrand, *The Records of the Federal Convention*, 3 vols. (New Haven, 1911). The best general account is the same writer's *The Framing of the Constitution of the United States* (New Haven, 1913).

[2] Elliot, *Debates*, V, 541.

[3] *The Federalist*, No. XXII (Lodge's ed., 135).

CHAP. XI

basis similar to that upon which the state constitutions rested except only in Massachusetts, where there had been a direct popular vote. The purpose of the second proposal was obviously to enable the new system to go into operation when approved by a substantial majority of the states, without waiting for the unanimity of action which the Articles required. Without delay or serious protest, Congress accepted both suggestions, and on September 28 the constitution was transmitted to the states for action.

Principal objections raised

The controversies that had stirred the convention were now brought home to the people; from New England to Georgia the new frame of government was seized upon and discussed, dissected, explained, praised, denounced. Objections arose in many quarters. There were men who, like Patrick Henry and Samuel Adams, were so imbued with the doctrines of liberty that they took instant offense at any proposal looking toward a centralization of authority. On the other hand, some people thought that the new plan did not provide for as much centralization as was needed. The paper-money elements were aroused by the clause which forbade the states to emit bills of credit. Many people in the North considered that too much was conceded to the slave-holding interests; many in the South felt that these interests had been dealt with unfairly. Large inland elements—small farmers, backwoodsmen, pioneers—feared the effects of the commercial powers given to Congress; men of property, although generally favorable, wondered how freely the new taxing powers would be used.[1] Everywhere the complaint was made, and justly, that the instrument failed to take any notice of those fundamental rights and liberties —freedom of speech, freedom of the press, freedom of assembly, the right of petition, and religious liberty—which had been so carefully guaranteed in the bills of rights prefixed to most of the state constitutions.[2] No single group of objections was dangerous alone, but in most states the several groups tended to merge into an opposition extremely difficult to convert or to overcome. The advocates of the new plan gained the name of Federalists, *i.e.*, people who favored union and federal government; the opponents were

[1] On the controlling influence of the professional and propertied classes in making and adopting the constitution see C. A. Beard, *Economic Interpretation of the Constitution* (New York, 1913), and O. G. Libby, *Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution* (Madison, 1894).

[2] For contemporary writings voicing the arguments of the instrument's opponents see P. L. Ford, *Pamphlets on the Constitution of the United States, Published during its Discussion by the People, 1787-1788* (Brooklyn, 1888).

called Anti-Federalists. Both elements took on many of the characteristics of political parties.

Ratification by nine states

In the Philadelphia convention the most determined opposition came from the small states. The conclusions reached there were, however, on the whole favorable to these states, which accordingly became the first to ratify. Delaware "came under the federal roof," as the phrase ran, on December 7, 1787; New Jersey, on December 18; Georgia on January 2, 1788, and Connecticut one week later. Pennsylvania, although a large state, was centrally located and federally inclined, and its convention ratified early, *i.e.*, December 12. This rapid pace, however, could not be maintained. In Massachusetts, Virginia, New York, and other states time was required to muster support, and while there was never much doubt that as many as nine states would eventually ratify, there was grave danger that one or more of the states which, by reason of their location and strength, were practically indispensable to the proposed union would remain obdurate. By cleverly appeasing Samuel Adams and John Hancock, to whom the Anti-Federalists of the interior looked for leadership, the supporters of the new system won in Massachusetts, February 7, 1788, although by a close vote and only after agreeing to a series of suggested amendments aimed at reducing the power of the central government. Between April and June, Maryland, South Carolina, and New Hampshire followed, each after a hard contest. This brought up the number to the required nine. But no one supposed that the new government could be successfully inaugurated on this minimum basis. Even after Virginia, following a peculiarly bitter fight in which Patrick Henry led the irreconcilables, gave a favorable decision, the battle was but half-won: New York was still outside, and New York was a pivotal state without which the union would be a mere caricature.

Ratification in New York: the "Federalist"

Moreover, the opposition in New York, especially in the rural sections, was very formidable. Appreciating this fact, the friends of the constitution made a special effort before the state convention met to convince the people that the instrument was a moderate, safe, workable plan of government. The most active champion was Hamilton, who conceived the idea of printing in the leading newspapers of the state a systematic exposition in the form of a series of brief public letters, and who associated with himself for the purpose another able New York Federalist, John Jay, and also the most convincing expounder outside of New York, namely,

CHAP. XI

Madison. The result was the remarkable group of papers, eighty-five in number, known to students of American history from that day to this as "The Federalist." These papers were signed "Publius," and in a few cases it is impossible to tell which of the three contributors was the author. But Hamilton is known to have written upwards of sixty, Madison about fifteen, and Jay a half-dozen. A few were written by Hamilton and Madison jointly. The letters were prepared in haste and published, at the rate of three or four a week, as campaign documents. But their authors were full of their subject and knew how to write, and, taken as a group, these papers have never been surpassed as examples of lucid, direct, and convincing exposition. Gathered in book form even before the series was finished, the collection has passed through more than thirty editions.[1] Better than anything else, it shows what the constitution meant to the men who made it.

The constitution put into effect

Whether because they were won over by "Publius" or because they were unwilling to see their state remain out of the union after all but two of the others had joined, the members of the New York convention finally ratified, July 26, although by a margin of only three votes. Meanwhile, on July 2, it was officially announced in Congress that the ninth state had ratified, and attention was turned to preparations for putting the new government into operation. The states were called upon to choose presidential electors, senators, and congressmen, and New York City was selected as the temporary seat of government. Then the old Congress, expiring prematurely for lack of a quorum, disappeared, leaving the field clear for its successor. The new House of Representatives was organized on April 2, 1789; the Senate came together three days later; and on April 30, Washington took the oath of office as president. Seven months afterwards North Carolina, won over by the decision of Congress to submit a bill of rights in the form of ten constitutional amendments, ratified the new fundamental law; and similar action by Rhode Island in the spring of 1790 made the union complete.[2]

"This paper," wrote Robert Morris in commending the constitution to a friend, "has been the subject of infinite investigation, disputation, and declamation. While some have boasted it as a

[1] The title of the first edition was *The Federalist; a Collection of Essays Written in Favor of the New Constitution* (New York, 1788). The best editions for present use are those of H. C. Lodge (New York, 1888) and P. L. Ford (New York, 1898).

[2] The launching of the new government is described in J. S. Bassett, *Federalist System*, Chap. I.

work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain honest men, and such, I think, it will appear." Herein is to be found the reason why the instrument, once adopted, succeeded beyond the hopes of its most ardent supporters. First, it was a brief and simple document. Even with the nineteen amendments that have been added, it fills not above twenty pages of print, and one can read it through in about the same number of minutes. It is shorter than the constitution of any other nation or of any one of the forty-eight states of the union. Its arrangement is not wholly logical, but nothing is sacrificed on that account. Following a brief preamble, three main articles are devoted to the legislative, executive, and judicial branches, respectively. Four lesser articles deal, in order, with the position of the states, the modes of amending the constitution, the supremacy of national power, and the state ratifications requisite for putting the instrument into effect. Finally come the amendments, which are not, as in the constitution of Switzerland, inserted at appropriate points in the body of the text, but are appended at the end and numbered serially.

Characteristics of the instrument

Thanks to the committee of detail, and especially to Gouverneur Morris, the language of the original instrument is clear, direct, and concise; there is not an unnecessary word or an intentionally ambiguous phrase.[1] Some clauses lend themselves, it is true, to varied interpretations, for example that authorizing Congress to "regulate commerce . . . among the several states"; and the conflicts and decisions arising from this source make up a considerable part of the country's constitutional history in the past hundred and twenty-five years. Nevertheless, our greatest constitutional controversies have risen rather from omissions than from provisions of doubtful meaning. In part, these omissions are accounted for by the impossibility of foreseeing certain contingencies, *e.g.*, the introduction of steam-power and of electricity, which have put a new aspect on the work of government. But in part they arose also from the unwillingness of the constitution's makers to jeopardize their work by forcing a decision on delicate

Room for differences of interpretation

[1] The ablest foreign writer on American government says that the instrument "ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details." J. Bryce, *American Commonwealth* (3rd ed.), I, 28.

CHAP. XI

matters which it was possible to pass over in silence. Could a state, by its own volition, withdraw from the new union? The constitution did not say. It could be plausibly argued that the union was to be permanent and that no member had a right to secede. On the other hand, the "sovereignty" of the states was nowhere expressly denied, and the thrice-repeated provision of the Articles that the union should be permanent found no place in the new instrument. The matter was glossed over, not because members like Madison and Hamilton were unmindful of it, but because it was inexpedient to press it when the preservation of a central government of any kind was hanging in the balance. The "plain honest men" of whom Morris wrote were bent on an immediate practical remedy of the defects of the existing government, not on making a constitution which would be an ideally logical, comprehensive, and conclusive instrument.

Sources of the constitution

It follows that the fathers did not go out of their way to invent new political forms. Nor did they borrow far afield. Some of them were students of Vattel, Montesquieu, and other continental writers; some had read history and could cite the failures of ancient confederacies or draw illustrations from the experiences of France and other continental states. But, as one writer has observed, this knowledge taught them rather what to avoid than what to adopt; and in so far as they drew upon European sources at all, those sources were the common law, the principles of Magna Carta and the Bill of Rights, the teachings of Locke and Blackstone, and other characteristic products of their English motherland. This rich heritage, however, had passed to America far back in colonial times and was deeply embedded in the constitutions, laws, and political usages of the states when the national constitution was made. That instrument, accordingly, was based directly upon the political experience of the Americans themselves in the colonial and Revolutionary periods. The object—let it be repeated—of those who framed and adopted the new organic law was merely to correct specific defects of the Articles of Confederation; and they found it entirely possible to do this without going far outside the range of their native political resources.[1]

[1] "The constitution is simply an application of the experience of Americans in the work of government. . . . With the exception of the method of electing the president, there is not a clause . . . which cannot be traced back to English statutes of liberty, colonial charters, state constitutions, the Articles of Confederation, votes of Congress, or the unwritten practice of some of these forms of government." A. B. Hart, *National Ideals Historically Traced*, 138-139.

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CHAPTER XII

THE NEW FEDERAL SYSTEM

Some fundamental questions about the new scheme of government

For upwards of a century and a quarter the constitution devised at Philadelphia in 1787 has formed the basis of our governmental system, and it is today the oldest written instrument of government in operation in any independent country. The remainder of this book will be devoted to a description of the governments, national and state, for which it directly or indirectly provides. Before taking up either national government or state government as such it is necessary, however, to give careful attention to several aspects of the American political system considered as a whole. What is the nature of the union of the states? To what extent is the government national and to what extent federal? What authority upholds the constitution and gives it sanction? What are the rights and duties of the states in their dealings one with another? Along what principal lines, and with what results, has the constitution, and the governmental system based on it, developed since 1789? What is the status of the individual citizen, and how are his rights protected by nation and by state? After considering these and related fundamentals, in the present chapter and the four chapters that follow, we ought to be prepared to see quite clearly the conditions and limitations under which national, state, and local governments carry on their work.

Perpetuation of the states

The most obvious, and the most important, fact about the constitution as it came from the hands of the framers is that while it provided for a new and stronger central government it also assumed, and indirectly provided for, the carrying over of the states and of their governmental systems from the Confederation. In other words, it was made—not for a federal state, because, as we have seen, there can be no such thing—but for a state with a federal form of government.[1] It extended to eleven states when

[1] To avoid confusion it will be necessary hereafter to speak of the United States, considered as a political entity, as a *nation*, rather than as a *state*, although the usage is technically incorrect. See p. 14.

it first took effect, and to thirteen when the work of ratification was complete. Furthermore, it authorized Congress to admit new states into the Union, and from 1791 onwards this power was used, as the western country filled with population, until in 1912 the admission of New Mexico and Arizona brought up the number to the present total of forty-eight.

Did the states remain sovereign?

When one takes up the study of any federal plan of government the first question that presents itself pertains to the relations existing, under the constitution, between the government of the nation on the one hand and the governments of the federated states on the other. In the case of the United States the problem really goes deeper than this; at all events it has done so historically. For in this country there was a long and bitter dispute, not simply upon the division of the powers of government, but upon the character of the union itself—as to whether, indeed, the United States was really a nation at all, or only, as before 1789, a league of sovereign states. Everybody recognized that the states were not mere administrative areas like the French departments, or even subordinate government areas with a limited autonomy conferred by the central government as are the English counties; they were conceded to be distinct, original, indestructible political entities, with extensive inherent powers. But did this mean that they were sovereign? Or were their people so merged in a common, superior, national political organization that the states as such had become a subordinate, almost an incidental, part of the general system?

The "state-rights" argument

The state rights school took the first view, the nationalist school the second. Starting with the familiar idea of the Revolutionary period that society is the result of compact and that government rests, as Jefferson put it, on "the consent of the governed," the state rights elements, led for a considerable time by Calhoun, developed a body of doctrine somewhat as follows: (1) the colonies, upon winning independence from Great Britain, became independent, sovereign states; (2) these states entered into a league under the Articles of Confederation without in any wise sacrificing their sovereignty; (3) the constitution was, similarly, a compact among independent political entities, conferring more power, it is true, upon the central government, yet not altering the basis or character of the union; (4) any state had a right to withdraw from the union if it considered that the terms of the compact were being violated by the co-states or by the government which they had set

CHAP. XII

up as their joint agent.[1] It had been a common view that sovereignty under the constitution was divided between the states and the United States. But Calhoun, rightly contending that sovereignty is by nature indivisible, attributed it exclusively to the states.

The nationalist argument

The nationalist school, growing ever more doubtful about the whole compact theory of society and government, put a very different interpretation on the constitution and the intentions of its framers. As forcefully presented by Webster in his speeches in reply to Hayne in 1830, and by Joseph Story in his "Commentaries on the Constitution," published in 1833, the nationalist argument was, in general, this: (1) the constitution was established, not by states, but by the people of the United States; (2) sovereignty—which the nationalists, agreeing with Calhoun, said was indivisible—was lodged, not in the states, nor yet in the central government as such, but in the people as a single aggregate; (3) the union is indestructible, in the sense that, being a union of people, and not of states, it can be overthrown or changed only by exercise of the ultimate right of revolution or by other action taken, not by states as such, but by the general body politic. "It is, sir, the people's constitution," declared Webster in his second speech in the debate of 1830, "made for the people, made by the people, and answerable to the people. The people of the United States have declared that this constitution shall be the supreme law."[2] It was the common nationalist view that the states were at no time in their existence really independent and sovereign; although some writers and debaters preferred not to go into that question, but rather to argue that, whether or not the states had formerly been sovereign, the constitution was not their handiwork and the sovereign authority behind it was the people.

Strength and weakness of the arguments

Considered in the light of contemporary evidence, the nationalist theory presents some serious difficulties. In the first place, the states in the Confederation period habitually spoke of themselves in their public documents as "sovereign"; there is overwhelming testimony that the people everywhere regarded them as such; Madison and Hamilton, and Webster himself, conceded the point; and no difference of opinion on the matter seems to have risen before 1830. In the second place, it is almost equally clear that when

[1] A. C. McLaughlin, "Social Compact and Constitutional Construction," *Amer. Hist. Rev.*, V, 467-490 (Apr., 1900), and *The Courts, the Constitution, and Parties* (Chicago, 1912), Chap. IV.

[2] *Works of Daniel Webster* (5th ed.), III, 321.

the constitution was adopted the people regarded it as a compact among the states. The instrument itself provided for its establishment *between the states* ratifying it; and in No. XXXIX of the "Federalist" Madison expressly says that the "assent and ratification" provided for "is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong," and that the act establishing the constitution was, therefore, to be "not a national but a federal act."[1]

There is, however, evidence pointing in the opposite direction. First, there is the negative circumstance that nowhere in the debates in the federal and state conventions, or in the pamphlets circulated to influence public opinion on the question of ratification, was the right of secession ever once asserted; on the contrary, affirmations that when the states had once entered the new union they could not withdraw repeatedly passed unchallenged. Ratification would doubtless have been opposed less strenuously had it been considered that a state could secede at will. It is significant, too, that the constitution was ratified and made effective, not by Congress, nor yet by the state legislatures, as it might very well have been, but by conventions made up of persons specially chosen by the people. It could therefore be plausibly argued that the people stood back of the new fundamental law in each particular state, even though they were not regarded as doing so as a single body politic throughout the country as a whole. Not to be overlooked, too, is the oft-quoted sentence with which the constitution opens: "We, the people of the United States, in order to form a more perfect union, . . . do ordain and establish this Constitution . . ."; even though this assertion of the preamble was clearly intended rather as a preliminary euphemistic flourish than as a sober statement of legal fact.

Conclusions that may be reached

The most careful survey of the evidence that can be made brings one to substantially the following conclusions. (1) The framers of the constitution and the men who took part in the debates upon it were not bent on carrying out some clear-cut, consistent theory. "The Americans," says Bryce, "had no theory of the state and felt no need for one, being content, like the English, to base their constitutional ideas upon law and history."[2] They were opportunists, looking only to the solution of imme-

[1] *Federalist* (Lodge's ed., 236).
[2] *American Commonwealth* (3rd ed.), II, 535.

diate difficulties in a purely practical way. (2) Along with much belief in the contractual nature of the new union went a widely shared conviction that a national state, under which no rights of nullification or secession would exist, was being set up. "To be sure, these two views are, and were, logically contradictory, and had the people of that time been political logicians, they would not have been able to accept them both. But this does not militate against the fact that, in truth, they did accept them both."[1] (3) To the fathers the idea of divided sovereignty presented no difficulty. They were content to think of the new central government as sovereign in respect to all powers delegated to it and the states as sovereign in everything else. The Supreme Court took this view in the case of Chisholm *v.* Georgia in 1792, and in a long line of subsequent decisions; Madison expounded it in many of his writings; the older state rights school fully accepted it; not until the generation to which Calhoun and Webster belonged came on the political stage was the notion discredited. (4) When pushed to state where the ultimate controlling authority lay, the fathers replied "with the people."[2] But they did not undertake to say whether this meant the citizen bodies of the thirteen states, severally considered, or the people of the country as a whole, considered without relation to state lines. Instead of giving any definitive answer to the question of the final location of sovereignty, they, as one writer has remarked, "merely pushed the problem one step further back and there left it as undetermined as before."

Historical triumph of the nationalist view

Happily, the logic of events has gone far toward clearing up these abstruse and debatable matters. Taken as a whole, the trend since 1789 has been decidedly in the direction of a strong national government based on an indissoluble union of the states. In a remarkable series of decisions in cases turning on constitutional questions the Supreme Court, notably during John Marshall's long service as chief justice, consistently threw its influence on the nationalist side. The denial and total extinction of the alleged right of a state to nullify acts of Congress, notwithstanding momentary successes of nullificationists in South Carolina and Georgia, worked to the same end. And—passing over a great number of other important factors—the failure of secession in

[1] W. W. Willoughby, *American Constitutional System*, 23.

[2] For example, James Wilson's argument in the Pennsylvania convention. J. Elliot, *Debates*, II, 504.

1860-65 and the general acceptance of the doctrine that a state cannot secede clinched the victory of nationalism and stamped the union with the character which, whatever the intentions of the founders, it nowadays bears.

Where is sovereignty lodged?

Technically considered, the matter of sovereignty is still somewhat obscure. It has been said in a former chapter that the test of sovereignty is the right to alter the form of government by changing the constitution or making a new one;[1] whoever has that right is really sovereign, regardless of forms or appearances. By its own terms, the national constitution, as we shall see, can be amended in either of two ways: by a two-thirds vote in both houses of Congress, followed by ratification by the legislatures of three-fourths of the states, or by the action of a convention called at the request of two-thirds of the state legislatures, with subsequent ratifications by three-fourths of them. The people do not act directly upon amendments at any stage. Nevertheless, it is not the central government that amends, nor is it the state governments. It is, rather, a combination of national and state bodies elected by the people, acting for the people, and subject, in the long run, to full popular control. If the people object to a sovereign act performed in their name they have a means, through the use of the electoral power, of causing it to be undone. The authority that stands back of the constitution and gives it sanction is, therefore, the people; and it is the people, not of Massachusetts and Virginia and Ohio, but of the United States. Sovereignty is undivided, and whatever may have been the case in earlier times, it belongs to the people of the nation considered as a single body politic; they, and they only, have the power to say the last word regarding the form and character of the government under which they live.

Only the *exercise* of sovereignty is divided

The thing that is divided under our system is not sovereignty itself, but the exercise of the powers that flow from sovereignty. The sovereign people cannot in the mass administer or judge; there are obvious limitations upon their ability even to legislate directly. Their only recourse is to entrust the exercise of their sovereign functions to an agent, *i.e.*, a "government." However, the prior existence of states, and their perpetuation in the union formed in 1789, complicates matters in a fashion quite unknown in France, Italy, and many other countries. When the constitution was framed these states enjoyed the exercise of substantially

[1] See p. 14.

CHAP. XII

complete sovereign powers, and no new frame of government could have been adopted which did not leave most of these powers intact. Many important powers, none the less, were entrusted to the new national government. Aside from making some provision for the machinery of this national government, the constitution was devoted chiefly, indeed, to delimiting the powers which the national and state governments should, respectively, wield.

Distribution of governmental powers: how made

This distribution was made in the instrument in both positive and negative ways. Positively, it was effected by direct grants of power to Congress, to the president, to the Supreme Court, and, by inference, to national agencies yet to be created. To this must be added provisions contained in two early amendments adopted with a view to removing all doubts about the "reserved" powers of the states. "The enumeration in the constitution," says the Ninth Amendment, "of certain rights shall not be construed to deny or disparage others retained by the people." "The powers not delegated to the United States by the constitution," adds the Tenth Amendment even more pointedly, "nor prohibited by it to the states, are reserved to the states respectively, or to the people." In a negative way, the distribution is further provided for by express denials of certain powers to the national government, to the states, or to both. This feature, indeed, differentiates the political system of the United States from that of the other great federally-organized English-speaking countries, Canada and Australia. The American fundamental law abounds in "constitutional limitations," whereas the constitutions of these dominions merely allot powers without laying down direct prohibitions.

As thus determined, the distribution works out in such a way as to produce three great groups of powers that are recognized or conferred and three groups that are partially or totally prohibited. They are as follows:

Powers recognized or conferred

1. *Powers vested in the national government exclusively.* These are named in the constitution and are meant to be powers which touch the interest of the people generally. They are also powers which by their nature need to be exercised by a single authority. Examples that come readily to mind are the management of foreign relations, the control of foreign and interstate commerce, the declaration and conduct of war, treaty-making, coinage, and the regulation of weights and measures.

2. *Powers reserved to the state governments exclusively.* Under the Tenth Amendment, quoted above, these include all

powers of government whatsoever which are not delegated to the United States and at the same time are not prohibited to the states. They are "reserved" powers, in the sense of powers remaining after some were delegated to the national government. They are not enumerated in the constitution, but are rather to be determined by process of elimination, as applied under the terms of the Tenth Amendment. Important illustrations are the regulation of both civil and criminal law and the exercise—in the main, at all events —of the "police power."

3. *Powers exercisable by both national and state governments.* These include, chiefly, powers which the state authorities were accustomed to exercise before 1789, and which, without being withdrawn from the state governments, were conferred on the national government as well. In the main, these concurrent powers are such as, in the nature of things, both governments must be permitted to exercise, *e.g.*, taxation, the encouragement of arts and manufactures, and the promotion of education.

Powers partially or totally prohibited

4. *Powers forbidden to the national government.* In theory, it was unnecessary for the fathers to prohibit the national government from doing certain things, because under the constitution this government has, in any case, only such powers as are conferred upon it. Nevertheless, the framers understood that differences of interpretation were likely to arise, and as a matter of fact the new government was hardly installed before such differences plunged the country into violent political controversy. Certain prohibitions, therefore, found a place in the constitution as originally adopted; for example, no tax may be laid on exports, and no capitation or other direct tax may be levied except in proportion to population. The original instrument, however, fell far short of popular desire in this direction, and of the ten amendments adopted in 1789-91 eight directly, and the other two indirectly, put the national government under further specific restraints. In this way Congress was forbidden to make any law abridging the freedom of speech or of the press; the fundamental principle was laid down that no person may be deprived of life, liberty, or property "without due process of law"; and it was prescribed that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

5. *Powers forbidden to the states.* Certain powers, as being either inherently objectionable or inimical to national unity, are forbidden to the states unconditionally; for example, making

CHAP. XII

treaties and alliances, coining money, emitting bills of credit, and granting letters of marque and reprisal. Certain other powers may be exercised only with the consent of Congress; for example, laying duties on imports or exports (except in so far as necessary for the enforcement of inspection laws), laying tonnage duties, keeping troops or ships of war in time of peace, and engaging in war "unless actually invaded or in such imminent danger as will not admit of delay."

6. *Powers forbidden to both national and state governments.* As is observed by Bryce, "there are things in America which there exists no organized and permanent authority capable of legally doing: not a state, because it is expressly forbidden; not the national government, because it either has not received the competence or has been expressly forbidden."[1] Thus, neither a state nor the United States can pass a bill of attainder or an ex post facto law; neither can grant a title of nobility; the national government is expressly forbidden to take private property for public use without just compensation, and judicial construction, developed in a long line of cases, applies the same rule to the states; the Fifteenth Amendment forbids nation and states alike to deny or abridge the right of citizens of the United States to vote "on account of race, color, or previous condition of servitude."

Underlying principles of the distribution of powers

This brief survey is sufficient to establish two or three major facts about the American governmental system. The first is that the system is, in the fullest sense, federal: the powers of government are divided by the ultimate sovereign, the people, through the medium of the constitution, between a central government and a number of state governments; and neither government can, as such, alter the distribution. The second fact is that the national government is, as has been said, a government of delegated, "enumerated," powers, while the state governments have powers that are original, inherent, and undefined. And a third fact is that no government in America is possessed of full and unrestricted powers. The unitary national government of Great Britain is legally omnipotent; Parliament, as its supreme organ, can amend the constitution, alter or abolish the local government areas, and legislate on any subject and in any fashion at will. The national government of the United States is obviously in no such position; and the state governments, while enjoying a wider lati-

[1] *American Commonwealth* (3rd ed.), I, 315.

tude, are hedged about on many sides by the restraints imposed in both the national and state constitutions.

The question of implied powers

The careful wording of the national constitution did not prevent—no phraseology could have prevented—differences of opinion from arising as to the limits of power of both the national and state governments. The issue was forced very early. In 1790 Hamilton proposed as part of his plan for the financial rehabilitation of the country the establishment of a national bank. Opponents of centralization immediately objected that the constitution, in enumerating the powers of Congress, said nothing about a bank. Hamilton and those who supported his policy replied that while the constitution did not, indeed, authorize Congress in so many words to create a bank, the power was to be implied from certain grants of authority which were explicitly made. The bank was established, but views upon it were not harmonized; and from this beginning the issue of "implied powers" broadened out until it became the most fundamental and contentious, aside from the question of the indissolubility of the Union, in the entire history of the country.

Led by Jefferson, the strict constructionists argued that the national government had no powers except such as were expressly delegated to it in the constitution, or, at the farthest, such as could be shown to be indispensably involved in the exercise of these express powers. To take a single step, urged Jefferson in a letter in which he gave Washington his views on the constitutionality of a national bank, beyond the boundaries "specially drawn" around the powers of Congress by the Tenth Amendment "is to take possession of a boundless field of power, no longer susceptible of any definition."[1] On the other hand, the loose, or broad, constructionists contended that the national government had all powers which could by any reasonable interpretation be regarded as implied in the letter of the granted powers, and also that it had a right to choose the manner and means of performing its work, even though this meant to use agencies which were not essential for its purposes. "There are express and implied powers," wrote Hamilton in the opinion which he rendered Washington on the bank question, "and the latter are as effectually delegated as the former. . . . The only question, then, is this: Has the means to be employed any natural relation to any of the acknowledged, law-

[1] *Writings of Jefferson* (Ford's ed.), V, 284.

CHAP. XII

ful *ends* of the government? The test of constitutionality lies in the *end* sought. Is the *end* included in the expressed powers? If it is so included, the means requisite and fairly applicable are constitutional."[1]

Practical necessity of implied powers

On grounds of pure theory, Jefferson's argument was logical; and events proved him right in predicting that the doctrine of implied powers, once admitted, would lead to never-ending absorption by the national government of powers originally considered as belonging to the states. The logic of practical necessity lay, however, with the Hamiltonian view. If the national government was to be really effective, it *must* exercise implied powers; only by so doing could it meet perplexing contingencies that presented themselves in steady succession. This was finally admitted, although grudgingly, by the Jeffersonians themselves, and when they came into control, in 1801, they proceeded to wield implied powers almost as freely as had their Federalist rivals. On no other basis—to mention but two illustrations—could Louisiana have been annexed in 1803 or an embargo laid on foreign trade in 1807. In a great series of nationalizing decisions between 1809 and 1835 the Supreme Court gave the weight of its authority to the doctrine, while yet laying down limits beyond which the principle could not constitutionally be carried.

Chief Justice Marshall on implied powers

The classic statement of the Court's views was made by Chief Justice Marshall in the case of McCulloch *v.* Maryland in 1819 as follows: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . The powers of the government are limited, and its powers are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and

[1] *Works* (Lodge's ed.), III, 449-450.

spirit of the constitution, are constitutional."[1] This principle firmly established itself and is today a leading feature of our constitutional law; although it should be added that there has been a tendency, especially in the past twenty years, to stretch it so as to make it cover a far wider range than Marshall contemplated.

The supremacy of the national government

One other salient feature of the federal system is the complete control of the national government within the sphere thus marked out for it. This is secured mainly by a clause of the constitution which reads as follows: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any states to the contrary notwithstanding."[2] "This clause," comments an able writer, "may be called the central clause of the constitution, because without it the whole system would be unwieldy, if not impracticable. Draw out this particular bolt, and the machinery falls to pieces. In these words the constitution is plainly made not merely a declaration, a manifesto, dependent for its life and usefulness on the passing will of statesmen or of people, but a fundamental law, enforceable like any other law in courts."[3] The national government acts by its own laws, through its own officers, upon its own citizens. It has direct powers of sovereignty over all the land and people of the United States, and has "full power to protect any right and to enforce any law of its own at any time, and at any place within its territorial limits, any resistance of private individuals, or state officials, acting with or without the authority of state law to the contrary notwithstanding. Having the authority, the United States has the right to declare illegal, to fix and enforce by its own tribunals a penalty upon any resistance opposed to its agents when acting within their official spheres, and, if necessary, to prevent by its own armed forces such interference when threatened or overcome it when actually attempted."[4] Furthermore, the state courts, no less than the national tribunals, are required to recognize the constitution as the supreme law and to enforce it as such.

[1] 4 Wheaton, 316. [2] Art. VI, § 2.
[3] A. C. McLaughlin, *Confederation and Constitution*, 247.
[4] W. W. Willoughby, *American Constitutional System*, 100.

CHAP. XII

When actually applied, the clause quoted proved, however, not so conclusive as it seemed. Indeed, difficult questions sprang from it, leading to prolonged and serious controversies. It was clear that both national and state authorities must carry out, or at least conform to, the provisions of the constitution itself. It was no less certain that every act of Congress passed in accordance with the terms of the constitution must be enforced. Finally, it was plain that no act of a state legislature which was contrary to the national constitution was enforceable. But, in case questions were raised, who was to interpret the constitution and say what its provisions meant? Who was to decide whether a given act of Congress was or was not "made in pursuance" of the constitution, in other words, whether it was "constitutional"? Similarly, who was to determine whether the measures of the state legislatures, when called in question, were in accord with the supreme law or contrary to it and therefore void?

Who was to settle conflicts between the nation and the states?

Proposal in the Virginia plan

The constitution does not say how these things shall be done, and there has always been difference of opinion as to what the framers intended. The Virginia plan, indeed, proposed to associate a "convenient" number of the federal judges with the executive to form a council of revision. This body was to examine every act passed by Congress, and any measure to which it objected was to be allowed to take effect only if subsequently re-enacted by a two-thirds vote in both houses. The convention's final decision was, however, to put the veto power in the hands of the president alone, and the question whether the Supreme Court, or any other purely judicial body, should have the power to declare laws unconstitutional was never discussed. In view of these facts, one school of writers has always maintained that the fathers did not intend that the courts should have such power, and that the exercise of it is unsupported by the letter and contrary to the spirit of the constitution, and therefore sheer usurpation. The state-rights forces sought, as we have seen, to make the states the sole judge of the constitutionality both of their own legislation and of the acts of Congress.

The doctrine of judicial review

The contrary view has, however, won more general acceptance. In the first place, the courts of the states had in several instances by 1787 refused to enforce legislative measures on the ground that they were unconstitutional.[1] In the second place, the men who framed and ratified the constitution represented those classes and

[1] See p. 115.

interests which, in the words of Gouverneur Morris, wanted to check the "precipitancy, changeableness, and excess" of popular legislative bodies and were likely to see in the exercise of judicial review an important means to that end. Finally, judicial review is entirely in accord with the general spirit of the constitution, notably with the theory of checks and balances which, as we shall see, runs through the entire instrument.[1]

Here again, however, fact is more important than theory; and the fact is that the power of judicial review was early brought into play by the Supreme Court and has been systematically employed by both federal and state courts for more than a hundred years. An act of Congress was for the first time held void by the Supreme Court on the ground of unconstitutionality in the case of Marbury *v.* Madison decided in 1803;[2] state statutes were similarly declared void in a long line of cases beginning with Fletcher *v.* Peck in 1810.[3] Thus was developed a function which sharply differentiates the American judiciary from the judicial establishments of most countries. Technically, the American courts do not veto or annul laws. They do not invalidate *laws* at all; for the measures which they pronounce unconstitutional are regarded as having never been laws (even though they may have been actually in operation for months or years), and moneys that have been paid over under them are recoverable. All measures, however, are presumed to be valid law until the courts pronounce them otherwise; and no federal court will render a decision on a given measure except in connection with an actual case arising under its operation.

How national supremacy is enforced

How is the national supremacy of which we have spoken maintained and enforced? Normally, by the ordinary routine processes of legislation and administration. But when these prove inadequate two great resources can be called into play. One is the authority of the president to execute the national laws by the use of force, whether the standing army, the militia, or some specially created military establishment. The other is the right of the federal courts to hear and decide cases in which national interests are involved. This use of the judiciary, in turn, appears in two chief

[1] These matters are clearly explained in C. A. Beard, *The Supreme Court and the Constitution*, especially Chaps. II-V. The rise of the practice of judicial review is ably described in A. C. McLaughlin, *The Courts, the Constitution, and Parties*, Chap. I.

[2] 1 Cranch, 137. To be more exact, that part of the Judiciary Act of 1789 which authorized the Supreme Court to issue a writ of mandamus under certain circumstances.

[3] 6 Cranch, 87.

forms. One is the right of the federal tribunals to hear appeals from the highest courts of the states. This right is granted to the Supreme Court in the constitution, and in the federal statutes it is so defined as to enable any case to be carried, upon writ of error, from a state court to the federal Supreme Court if (a) during the proceedings in the state court any state statute, or exercise of state authority, is alleged to be contrary to the national constitution, laws, or treaties, and yet is upheld by the state tribunal, or if (b) a state law is declared by the state court to violate the federal constitution. The other mode of judicial control is the removal of cases from state courts to federal courts, and is commonly employed when a national officer, in the exercise of his duties, performs an act which is contrary to state law and is, on that account, put on trial in a state court.[1] In these and other ways the federal courts steadily uphold the supremacy of national law and the independence of national officers; and the state courts are restrained from interfering in any way with national judicial processes.

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[1] Tennessee *v.* Davis, 100 U. S. R., 257 (1880).

CHAPTER XIII

THE STATES

"An American," wrote Lord Bryce a generation ago, "may, through a long life, never be reminded of the federal government, except when he votes at presidential and congressional elections, buys a package of tobacco bearing the government stamp, lodges a complaint against the post-office, and opens his trunks for a custom-house officer on the pier at New York when he returns from a tour in Europe. His direct taxes are paid to officials acting under state laws. The state, or local authority constituted by state statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he enters a trade (if it be one needing a license), marries him, divorces him, entertains civil actions against him, declares him a bankrupt, hangs him for murder. The police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools—all these derive their legal powers from his state alone. Looking at this immense compass of state functions, Jefferson would seem to have been not far wrong when he said that the federal government was nothing more than the American department of foreign affairs."[1] Importance

Since Jefferson's time the activities of the national government have been steadily multiplied; and they are far more numerous today than they were even when Lord Bryce wrote. The citizen now comes into contact with the authority, and with the agents, of the government at Washington much more frequently, both in time of war and in time of peace. None the less, Lord Bryce's observations are still fundamentally true. The state attracts less attention than the nation, both at home and abroad. But it is just as important; indeed, in the daily life of the average man and woman it is vastly more important.

The way in which the states are organized and governed will be described in a later portion of this book. For the present we are

[1] *American Commonwealth* (3rd ed.), I, 425-426.

CHAP. XIII

concerned only with some further aspects of their position in the governmental system considered as a whole.

Equality in law

The first thing to be observed is that the states are equals in law and that, being such, they are free from control one by another. In size, population, and importance they, of course, vary enormously. The largest, Texas, has an area of 265,780 square miles, which is almost exactly the combined extent of France, England, and Wales; the smallest, Rhode Island, contains only 1,250 square miles. The most populous, New York, has 10,385,227 inhabitants; the least populous, Nevada, has 77,407. Average density of population varies all the way from 566.4 per square mile in Rhode Island to 0.7 per square mile in Nevada.[1] Some states are almost wholly agricultural, others are mainly industrial and commercial. Some are of great weight in the councils of the nation, others count for comparatively little. All have their separate and differing constitutions, laws, courts, systems of taxation, and schemes of local government. None the less, in their constitutional and legal status they are equal. No one of them has any powers which do not belong to all of the others. Constitutional limitations, about which more will be said presently, apply to all alike. All have the same obligations toward the national government, toward their citizens, and toward each other. Finally, no one of them can, as a commonwealth, exercise any form of coercion upon another. The only qualification which it is necessary to add is that, as will appear, Congress, when admitting a new state, can impose conditions upon it which were not exacted of other states. But as a restriction upon state equality this is more apparent than real, because, once a state is in the Union, political conditions which it has been required to meet are usually not difficult to evade if the inhabitants are so minded. It is to be observed that legal equality does not always prevail among the states affiliated under a federal form of government. The cantons of Switzerland, like the American states, stand on a common footing. But in the former German Empire the kingdom of Prussia had special powers and privileges, arising not only from interstate agreements but also from stipulations made in the imperial constitution. The south German states likewise had certain constitutional *Sonderrechte,* or "reserved rights."[2]

[1] By the census of 1920.

[2] F. A. Ogg, *The Governments of Europe* (rev. ed.), 625-627.

CHAP. XIII

Obligations of the national government toward the states:

The position of the states is further determined by certain obligations which the constitution imposes in their behalf upon the national government. In the first place, that government is bound to respect a state's territorial integrity. Under no circumstances may a state be "formed or erected" within the jurisdiction of any other state; nor may a state be formed by uniting two or more states or parts of states without the consent of the legislatures of the states affected.[1] In other words, a state cannot be deprived of its separate existence, or even of territory, without its own consent.

1. Respect for territorial integrity

2. Protection against invasion and domestic violence

A second obligation of the national government is to protect each state against invasion and domestic violence.[2] An invasion of a state by a foreign enemy is, of course, also an invasion of the United States, and it is entirely logical that the national government should be authorized and required to repel the attack without waiting for any independent effort to be made by the states as such, or for a request for protection to be received from them. The repression of insurrections, riots, and other forms of domestic violence is a different matter. One of the principal things that the government of a state is expected to do is to maintain order; and unless, finding itself unable to cope with a situation, such a government calls upon the national authorities for assistance, those authorities will not intervene, so long as the national laws are not violated and national property is not endangered. If, however, assistance is requested, the president will comply, unless he feels that the state can itself handle the situation adequately; and if national interests are jeopardized he will act without invitation from the state, and even against its consent.[3]

3. Guarantee of a republican form of government

A third requirement made of the United States is that it shall guarantee to every state a republican form of government.[4] The men who framed and adopted the constitution had no mind to see monarchical institutions revived or oligarchy established within the limits of the new nation. They shuddered at the recollection of the Shays Rebellion and other movements which had threatened to upset existing governments, and they determined to put it within the power—indeed to make it a solemn duty—of the national government to prevent any form of political organization other than republican from establishing itself anywhere in the country. They did not define the term "republican," and it is clear that they did not mean to require any one precise style of

[1] Art. IV, § 3. [2] Art. IV, § 4. [3] See pp. 271-272. [4] Art. IV, § 4.

CHAP. XIII

governmental organization, to the exclusion of all others. Madison specially assured the people that they had a right to "substitute other republican forms" and to claim the federal guaranty for them whenever they chose.[1] All of the existing state governments, although in many respects dissimilar, were regarded as falling within the scope of the term, and likewise, of course, the new national government under the constitution. The contemporary idea of what constitutes republicanism is sufficiently indicated by a resolution of the Massachusetts constitutional convention of 1780 which says: "It is the essence of a free republic that the people be governed by fixed laws of their own making."[2] Paraphrased by a recent writer, the definition becomes: "A republican form of government . . . is one in which the will of the people is the highest source of authority and looks for its interpretation and execution to responsible agents acting under the forms of law."[3]

Who decides when a state government is republican?

The final judge of whether the government of a state is republican is, not the people of the state, but the national government. The constitution does not say which branch of the national government shall decide. Conceivably, the president could declare the government of a given state to be non-republican and could use force to dispossess it; indeed in the single case in which the guaranty clause was brought into operation up to the time of the Civil War, *i.e.*, the Dorr rebellion in Rhode Island in 1841-42, the president recognized the old government of the state as the rightful government and took steps to give it the aid which it asked against a new rival government set up by an insurrectionary element.[4] But it is Congress that has the readiest means of applying the necessary pressure; and it is Congress that would be most likely, should necessity arise, to exercise the power. If Congress should decide that a state's government was not republican, the two houses could refuse to seat the senators and representatives elected from that state. This would cut off the state from any share in national legislation and taxation, and would be very likely to lead to such changes in the state's system of government as would remove congressional objections. It was in this way that Congress overruled President Johnson's moderate plan of reconstruction and compelled the southern states to adopt governmental arrangements of the sort which the majority at Washington professed to consider

[1] *The Federalist*, No. XLIII (Lodge's ed., 271).
[2] *Journal of Massachusetts Constitutional Convention, 1779-1780*, 24.
[3] A. N. Holcombe, *State Government in the United States*, 39.
[4] Luther *v.* Borden, 7 Howard, 1 (1848).

requisite for republican government. As this experience shows, the duty assigned to the national government by the constitution is capable of being made the means of forcing upon a state a political system which it does not want, even though this is generally conceded to be an illegitimate use of the power conferred.

The term to be construed broadly

The question of what constitutes republican government has been raised repeatedly since the Reconstruction period. Thus at one time it was contended that a state which denied the suffrage to women did not have republican government. The courts, however, held that since only one state[1] permitted women to vote at the time when the constitution was adopted—although all of the state governments were considered republican—equal suffrage for men and women cannot be regarded as essential to republican government.[2] Later, the initiative and referendum were attacked as being not republican, and therefore unconstitutional. Republican government, it was said, means representative government; the initiative and referendum are modes of direct legislation; hence they are inconsistent with the requirement that the governments of the states shall be republican. Although certain expressions of Madison, Jefferson, and other early statesmen linked up the ideas of republicanism and representation, ample historical evidence, as well as common sense, forbids the conclusion that a government must be operated in all of its parts in strict accordance with the representative principle in order to be regarded as republican in the meaning of the constitution. In deciding cases turning on the nature of republicanism the Supreme Court has always held that the question is political in character and hence one to be decided by the political departments of the government, not by the judiciary.[3]

Admission of states to the Union

The thirteen "original" states became members of the Union by participating together in the Revolution and ratifying the Articles of Confederation and the present constitution. The other thirty-five have been brought in by a series of special acts of Congress. Considered from the point of view of the circumstances under which they were admitted, these newer commonwealths fall into four classes: (1) five which were formed by separation from other states, *i.e.*, Vermont set off from New York in 1791, Kentucky from Virginia in 1792, Tennessee from North Carolina in 1796, Maine from Massachusetts in 1820, and West Virginia from Vir-

[1] New Jersey. [2] Minor *v.* Happersett, 21 Wallace, 162 (1874).
[3] Pacific States Tel. and Tel. Co. *v.* Oregon, 223 U. S., 118 (1912).

CHAP. XIII

ginia in 1862;[1] (2) one, *i.e.*, Texas, which before its admission in 1845 was an independent nation; (3) one, *i.e.*, California, which was formed, also without passing through the territorial stage, out of a region ceded by Mexico in 1848; and (4) twenty-eight which have been formed out of pre-existing organized territories.

Process of admission

The constitution confers on Congress general power to admit new states, subject only to two restrictions: (1) that no new state shall be erected within the jurisdiction of any other state, and (2) that no state shall be formed by the union of two or more states or parts of states without the consent of the legislatures of the states concerned as well as of Congress. How many states shall be admitted and what population a territory shall have before being admitted are left entirely to the discretion of Congress. Furthermore, the steps to be taken in admitting a state are not specified, although a simple and substantially uniform procedure has grown up. Ordinarily the process is set in motion by the people of a territory, who, if a sufficient number desire statehood, send a petition to Congress asking that the territory be reorganized and received into the Union as a state. If the petition is regarded with favor, Congress passes an "enabling act" authorizing the territorial officials to arrange for a popularly elected convention to frame a state constitution. This constitution is forthwith prepared and submitted to the people. If it is adopted, it is sent to Congress for approval; and if it is there found acceptable, a resolution is passed declaring the said territory a state. Occasionally a territory omits the initial petition and comes directly to Congress with a proposed constitution.

Congressional and presidential objections

What happens in case Congress finds something to disapprove in the constitution that is offered? This situation has, in point of fact, risen a number of times. The national legislature will, of course, communicate its objections to the people of the territory, suggesting or requiring that certain changes be made. If it puts its ideas in the form of a positive requirement, there is nothing for the territory to do save comply or wait for a change of opinion in the two houses; for without the consent of Congress no territory can become a state. But it is not simply Congress that has the power to object. The president, too, can take exception to a proposed constitution and can veto a resolution providing for

[1] The act admitting Texas in 1845 provided that that state might be split up into not more than five states. Notwithstanding its exceptional size, the state has never cared to be divided.

admission. This is what happened in the case of the last of the forty-eight states to be admitted, *i.e.*, Arizona. Under the authority of an enabling act passed in 1910, the people of Arizona drew up and adopted a constitution which, in addition to other radical features, made provision for the recall of judges by popular vote. Many members of Congress believed that judges ought not to be subject to recall. Nevertheless, a joint resolution for the admission of the new state was passed. President Taft felt so strongly on the subject that he vetoed the resolution; whereupon another resolution was passed, in conformity with the president's ideas, providing for the admission of Arizona on an equal footing with the other states on condition that the recall of judges should be stricken out of the constitution. The people of the territory assented; and, having thus met the condition imposed, Arizona took her place in the Union early in 1912.

This episode, furthermore, illustrates the fact already mentioned that, once a state is in the Union, it can disregard with impunity a restriction that has been laid upon it as a condition of its admission. When the people of Arizona voted to eliminate the recall of judges from the proposed constitution it was locally understood that the alteration would be only temporary. And so it fell out. In his first message the governor of the new state recommended a constitutional amendment reinstating the recall, and before the close of the year in which the state was admitted the amendment was duly adopted by both legislature and people.

Conditions imposed on incoming states

From what has been said it is evident that the power to admit or refuse to admit can be so used as to exact conditions of incoming states, or to impose limitations on them, such as were not applied to earlier members of the Union. Illustrations are numerous. The Northwest Ordinance of 1787, re-enacted by Congress in 1789, provided that new states created from the territory to which the ordinance applied should be admitted "on an equal footing with the original states in all respects whatever." Yet when Ohio was admitted, in 1802, the state was required to agree not to tax for a period of five years any lands sold within its borders by the United States; and a similar requirement was made of several states admitted later. Nevada was admitted in 1864 under pledge not to deny the right to vote to any person on account of color. Nebraska, three years later, was required to agree not to deny the suffrage or any other right on account of race or color, Indians excepted. Utah, when admitted in 1894, was required to

make "by ordinance irrevocable without the consent of the United States" provision for complete religious toleration, for non-sectarian schools, and for the abolition of polygamy. On the ground that it was in the nature of a simple agreement relating to property, a limitation binding the newly-admitted state of Minnesota not to impose any tax on lands belonging to the United States, or any higher tax on non-resident proprietors than on residents, has been upheld by the Supreme Court.[1] On the other hand, the Court has emphatically declared that, after becoming a member of the Union, a state cannot be compelled to observe limitations of a political nature imposed upon it as a condition of its admission.[2] In summary, therefore, Congress may, notwithstanding the theory of state equality, require territories to meet any conditions that it sees fit to impose before permitting them to become members of the Union. But the obligations assumed can afterwards be disregarded with impunity unless they are in the nature of compacts on the subject of property rights.[3]

Constitutional limitations on the states:

Except in so far as they are severally restricted by agreements entered into at the time of their admission, all states have the same kinds of authority and power, however much or little they may exercise their rights in any particular direction. The way in which state powers are determined has been described in the previous chapter. Briefly recapitulated, the process is as follows: (1) certain specified powers, *e.g.*, ex post facto legislation, are forbidden by the national constitution to be exercised at all; (2) all remaining powers are divided between the national government and the state governments; (3) the powers belonging to the national government are named and conferred in the national constitution; and (4) the powers belonging to the state governments are "original," or inherent, and include everything which is neither given to the national government nor prohibited by it to the states. No attempt is made in the national constitution to list the powers of the states. Any list that could have been drawn up would, by its very nature, fix limits which no one desired to establish; besides, it would be superfluous, since the constitution makes it clear that the states have all powers not bestowed elsewhere or otherwise taken away.

[1] Stearns *v.* Minnesota, 179 U. S., 223 (1900).

[2] Escanaba Co. *v.* Chicago, 107 U. S., 678 (1883), and Bollin *v.* Nebraska, 176 U. S., 83 (1900).

[3] W. A. Dunning, "Are the States Equal under the Constitution?" *Polit. Sci. Quar.*, III, 425-453 (Sept., 1888).

Powers have been withdrawn from the states partly by being given over exclusively to the United States, *e.g.*, treaty-making, and partly by being prohibited to the states, regardless of whether they can be exercised by the national government. This brings us to the subject of "constitutional limitations," *i.e.*, the positive restrictions imposed by the national fundamental law upon state action. Certain of these restrictions which pertain to the rights and liberties of the individual citizen can be considered more appropriately in the succeeding chapter. But most of them can be indicated at this point, with brief comment on the way in which they are construed by the courts.

1. Foreign and interstate relations

The national constitution unequivocally forbids a state to enter into "any treaty, alliance, or confederation," and it prohibits any "agreement or compact" between states or between a state and a foreign power except with the consent of Congress. Likewise, a state may not, unless Congress assents, keep troops or ships of war in time of peace, or engage in war unless actually invaded or in such imminent danger as will not admit of delay. If Massachusetts desires to enter into an agreement with Great Britain, she can do so, with the permission of Congress, so long as the effect is not to create a political alliance or confederation; under similar limitations, two or more states can make an agreement among themselves. Indeed, it has been held that interstate agreements can be entered into on certain subjects without congressional consent; for example, two states may agree, quite independently, to clean up a disease-producing district on their common border. The restriction is construed as designed to apply only to agreements "tending to the increase of the political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[1] Where the consent of Congress is necessary, it may be given either before or after the agreement has been made, and may be either express or implied.[2]

2. Taxation

The national constitution imposes no express and absolute limitation on the taxing power of the states. But it permits certain kinds of taxes to be levied only with the consent of Congress, and it contains several clauses of a general character which operate to keep the taxing authorities within bounds. The taxes which may not be laid without the consent of Congress are (a) imposts or

[1] Virginia *v.* Tennessee, 148 U. S., 503 (1893).

[2] For an interesting and important agreement between New York and New Jersey concerning the port development of New York City see *Nat. Munic. Rev.*, X, 449-451 (Sept., 1921).

CHAP. XIII

duties on imports or exports, except such as may be necessary for the enforcement of state inspection laws, and (b) tonnage duties. Under the Articles of Confederation the states had the power to

(a) tariff duties

lay duties on imports and exports, with only the limitation that such imposts must not interfere with certain treaties entered into by the United States. The national government had no such power whatever; whence arose, largely, its financial embarrassments. Attempts to amend the Articles in this respect were fruitless. But when the new constitution was made, one of the first decisions was to give the national government sole power to lay duties on imports (although exports were not to be taxed), with only the slight qualification which has been mentioned in favor of the states. In order to take away all financial motives, and thus to reduce to a minimum the exercise of such duty-levying power as remains to the states, it is stipulated that if a state lays any duties on imports or exports, the net yield shall be turned over to the national treasury. Furthermore, Congress is authorized to revise and control all state laws on the subject.

(b) tonnage duties

A tonnage duty is a tax on ships levied on the basis of capacity, which is expressed in tons of one hundred cubical feet each. Vessels may be taxed independently by a state in the same way, *i.e.*, in accordance with value, that other property within the state's jurisdiction is taxed. A tax on the carrying capacity of a ship, however, is conceived of as a tax on an instrument of commerce and navigation, and can be laid only with the consent of Congress. "It makes no difference," the Supreme Court has said, "whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances without the consent of Congress."[1]

(c) taxes on federal instrumentalities

Another and more important limitation on the taxing power of the states arises, not from any express provision in the constitution, but from judicial interpretation of the character of the union which that instrument was meant to establish. This limitation is the principle that a state may not tax national property, tangible or intangible, or any lawful national agency or instrumentality. This rule was propounded most clearly and authoritatively in the famous decision prepared by Chief Justice Marshall in the case of McCulloch *v.* Maryland in 1819. In 1818 the state

[1] State Tonnage Tax Cases, 12 Wallace, 204 (1871).

of Maryland imposed a stamp tax on the circulating notes of all banks or branches thereof located in the state and not chartered by the legislature. The Baltimore branch of the United States Bank refused to pay this tax. Suit was brought against the cashier, McCulloch, and the state court rendered judgment against him; whereupon the case was taken to the federal Supreme Court. Pronouncing the law imposing the tax unconstitutional, Marshall declared that, unlimited as is the power of a state to tax objects within its jurisdiction, that power does not "extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States . . . powers . . . given . . . to a government whose laws . . . are declared to be supreme."[1]

Maryland's attorneys argued that since the taxing power is concurrent in the national and state governments, the states can tax a national bank as fully as the nation can tax state banks. This reasoning Marshall declared fallacious. When the whole American people and all the states tax state banks by an act of Congress, "they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. . . . The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme. . . . If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. . . . The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[2]

The states are, accordingly, debarred from taxing national bonds, national franchises, the salaries of national officers, and national property, such as lands, buildings, fortifications, and

[1] 4 Wheaton, 429-430 (1819). [2] *Ibid.*, 435-436.

CHAP. XIII

lighthouses. Under provisions of an act of Congress passed in 1864 they, however, may tax national bank stock, and likewise the physical property belonging to national banks. Such taxes, falling on property rather than on operations, are considered not to detract from the capacity of the banks to serve the government according to the intent of the laws establishing them, and on this account the legislation of 1864 has been construed to be, not a grant by the United States of a power not previously possessed (Congress has no authority to make such a grant), but rather the removal by Congress of a hindrance to the exercise by the states of a power inherent in them.[1]

(d) other restraints

Finally, it may be pointed out that state powers of taxation are in practice restricted by (1) the inability of a state to give force to its laws outside of its own boundaries, from which it results that only such property can be taxed as is within the jurisdiction of the state;[2] and (2) the constitutional provision (a) that no state shall "deprive any person of . . . property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws," (b) that no state shall pass any law "impairing the obligation of contracts," and (c) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The taxing power cannot be so used as to violate any of these general restraining clauses.

3. Commerce

We have seen that one of the main objects of those who urged the revision of the Articles of Confederation was to remedy the chaotic condition of commerce arising from the conflicting commercial policies of the several states and from the total lack of power of the national government to deal with the subject. The states could not have been expected to yield control of trade within their own borders to any outside authority, and no one asked that they should do so. But the need that was chiefly felt was met in the simple statement in the new constitution that Congress should have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."[3] The nature and methods of national control over foreign and interstate commerce will be considered at length in a later chapter,[4] and it must suffice

[1] Van Allen *v.* Assessors, 3 Wallace, 573 (1865). It should be observed that in the case of McCulloch *v.* Maryland the Supreme Court denied the right of Maryland to tax the circulation of the Baltimore branch of the National Bank, but did not question the state's right to tax the branch's real property.

[2] The difficulty of determining precisely what property is within the jurisdiction of a state is described in W. W. Willoughby, *Constitutional Law of the U. S.*, II, 943-969.

[3] Art. I, § 8, cl. 3.

[4] Chap. XXVIII.

at this point to mention but two or three aspects that affect the powers of the states.

Broadening of the national government's commerce power

For upwards of a half-century after the adoption of the constitution the regulating authority of the national government was exercised mainly upon foreign, rather than interstate, commerce; the latter was not yet very extensive and the problems presented by it were relatively simple. The past hundred years, however, have brought a marvelous expansion of commerce among the states. New means of shipping goods and transmitting ideas—the railroad, the telegraph, the telephone, wireless telegraphy—have annihilated distance; industry has developed on such a scale as to be utterly dependent on interstate and foreign trade for its raw materials and its markets; hardly an individual fails to be touched in one way or another by interstate commerce every day that he lives. The need and the difficulty of regulation have been proportionately augmented; and on the slender, yet sufficient, basis of the clause above quoted, the national government's commerce power has been developed by stages into a volume of regulatory authority wholly beyond the conception of the constitution's authors, or even of contemporaries of Clay and Webster. Commerce has been redefined to include not only every form of transportation on land, and all navigation, but transportation in the air and the transmission of ideas by telegraph, telephone, and wireless; and the power of Congress to regulate has been construed by the Supreme Court to reach so far as to include the taxing of the manufacture of an article (transported in interstate commerce) in such a degree as to make manufacture unprofitable and therefore, in effect, impossible.[1]

What is interstate commerce?

New forms of transportation and communication automatically broaden the scope of the national regulating power; more voluminous and penetrating congressional legislation, backed up by the Supreme Court, operates to the same end. The boundaries between national and state jurisdiction are thus in constant flux. But the general result is to extend the range of the former and, proportionately, to narrow that of the latter. The states retain full control of intrastate commerce. But this is construed, very strictly, to mean only commerce which originates, ends, and has its whole course in a single state. If it passes for but an instant beyond the state's borders, the state loses control and the laws of Congress apply. Furthermore, commerce which at any stage takes

[1] McCray *v.* U. S., 195 U. S., 27 (1904). This is the Oleomargarine case, decided in 1904.

on an interstate character is dealt with as such from the moment that the transaction starts until it is completed. An automobile shipped from Detroit to New York becomes an article of interstate commerce when it is delivered by the shipper at the freight depot of the carrier and ceases to be such only when it is turned over to the consignee. This is, incidentally, a matter of importance in determining the point at which goods shipped into a state become subject to taxation in that state. They are exempt as long as they remain articles of interstate commerce; they become liable as soon as, by sale or otherwise, they become mixed with the general mass of property in the state. To aid in determining when this commingling takes place, the courts long ago developed the "original package" doctrine, which is that so long as the commodity is kept in the unbroken package in which it was delivered to the carrier for transportation, no intermixture with the state goods has taken place.[1]

Interstate commerce not immune from state regulation

It must not be inferred, however, that the states can exercise no control whatsoever over interstate commerce. In point of fact, they can do many things which help to determine the conditions under which such commerce is carried on. Incidental to regulating commerce within their own boundaries, they can make laws or rules concerning bridges, ferries, crossings, pilotage, and harbors which, in the absence of countervailing national legislation, the courts will uphold as applying to interstate traffic as well.[2] The exercise of the police power, also, enables the states to make and enforce measures which incidentally, but often palpably, affect interstate commerce. Thus, with a view to the public safety, a state legislature may regulate the speed of interstate, as well as intrastate, trains; may forbid the heating of cars by stoves; and may require engineers to be tested from time to time for color-blindness.[3] Similarly, state inspection laws, designed to protect the public against disease and fraud, are valid even though applied, as is almost invariably the case, to articles of interstate, equally with those of intrastate, commerce—always assuming that they do not conflict with existing federal statutes.[4]

[1] This doctrine was first enunciated with respect to foreign commerce in Brown *v.* Maryland, 12 Wheaton, 419 (1827), and with respect to interstate commerce in Leisy *v.* Hardin, 135 U. S., 100 (1890). Many practical difficulties arise in applying it.

[2] Cooley *v.* Wardens of the Port, 12 Howard, 299 (1851).

[3] See list of cases in Willoughby, *Constitutional Law of the U. S.*, II, 666.

[4] Gibbons *v.* Ogden, 9 Wheaton, 1 (1824).

4. Currency

One of the main advantages of union is a common currency system. Hence the federal constitution gives the national government full control of the currency and forbids the states to coin money, to emit bills of credit, or to "make anything but gold and silver coin a tender in payment of debts." Under their reserved powers, the states can charter banks; and banking institutions so created exist beside, and compete with, national banks in all of the states. Furthermore, the states can authorize these banks and banking associations to issue notes for circulation. An act of Congress passed in 1866, however, rendered this power of little practical value, because the ten per cent tax laid on the notes made it unprofitable to issue them. The constitutionality of this law was challenged, but the Supreme Court upheld it on the ground that the tax was a means of regulating the currency, which is a function clearly belonging to the national government. "Congress," the court said, "may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. . . . We cannot doubt the constitutionality of the tax under consideration."[1] As a result, state bank currency has gone wholly out of use.

5. Contracts

Society exists and business is carried on by virtue of a network of human relations which find expression in agreements, or contracts; and little thought is required to show how insecure and impossible our everyday existence would be if these agreements could be disregarded with impunity. It is not strange, therefore, that the framers of the national constitution put into that instrument a clause explicitly forbidding the states to pass any law impairing the obligation of contracts. They did not lay a similar prohibition on the national government; but this was mainly because it was expected that the business relationships of men would be controlled by the state governments rather than by Congress.

A contract may be defined as an agreement enforceable at law; and no state legislation which weakens the obligations arising from such an agreement after it has been entered into by two or more parties is valid unless considerations of public health, safety, or morals demand it or compensation is rendered for the injury done. Both the definition and the rule are, however, easier to state than to apply. Ordinary agreements, executed in due legal form, between individuals or groups of individuals are obviously included.

[1] Veazie Bank *v.* Fenno, 8 Wallace, 533 (1869).

CHAP. XIII

Charters, franchises, etc., not included

But how about a charter granted by a state to a bank or a railroad company? Or an appointment to a public office? Or a license to practice medicine? These and many similar questions have been the subject of great numbers of judicial decisions, whose general results can only be summarized here. In the Dartmouth College case, in 1819, the Supreme Court held that the charter of the college was a contract which the state legislature had no power either to revoke or impair without the college's consent.[1] This meant that franchises and charters obtained by private corporations from state legislatures were within the scope of the constitutional guarantee; and corporations long tried to maintain that any withdrawal or curtailment of the privileges that had been granted them was an illegal impairment of contract. If this contention could have been established, the results would have been serious. But the courts took the common-sense view that charters and franchises are, after all, only a species of property, and as such can be taken away with compensation—or even without compensation when it can be shown that supreme interests of public welfare demand it. Furthermore, it is open to the legislatures, when granting new charters, to insert in them clauses making them revocable or alterable at will; and this is now usually done. Having taken this precaution, a state can act at any time with impunity, subject only to the limitations contained in the Fourteenth Amendment.

By judicial determination, the charters of public corporations, *e.g.*, cities and counties, investing them with subordinate legislative and other governmental powers are not contracts within the meaning of the "obligation" clause. So far as the national constitution is concerned, the state legislature can repeal them or amend them in any way at any time. Various forms of agreement between a state and its citizens are also construed not to be contracts. Thus a person who is appointed to a public office for a fixed term and at a definite salary acquires no vested right, and no contract is violated if the state abolishes the office altogether. Furthermore, a license issued by a state, or by one of its political subdivisions, is not a contract, but only a grant of privilege which can be legally revoked at any time.

Obligations of the states in their relations one with another:

Except in so far as the national constitution has provided otherwise, the states are separate, and each is supreme within its own sphere of authority. Massachusetts cannot give force to her laws

[1] Dartmouth College *v.* Woodward, 4 Wheaton, 518 (1819).

in Connecticut; an Ohio judge cannot hold court in Indiana. Every state, however, must have dealings from time to time with all of the other states, and the populations of all of the forty-eight are constantly commingling in pursuit of the various professions. It becomes, therefore, a practical necessity that the states accept in common certain obligations one toward another. Four specific obligations were, indeed, imposed by the national constitution as originally adopted. One of them—the duty to deliver up fugitive slaves escaping from one state into another—became obsolete upon the adoption of the Thirteenth Amendment in 1865. The other three continue in effect and pertain to (1) recognition of legal processes and acts, (2) interstate citizenship, and (3) extradition of persons accused of crime.

1. Recognition of legal processes and acts

"Full faith and credit," says the constitution, "shall be given in each state to the public acts, records, and judicial proceedings of every other state."[1] This means that the authorities of Illinois must recognize and accept a decision of a court in Michigan, on presentation of an authenticated copy of the record, precisely as they would honor the decision of a court in their own state. If it should fall to an Illinois court to enforce the decision, it would do so without a re-trial of the issue. To make the illustration more concrete: A. and B. are residents of Detroit. A. brings suit against B. and gets a judgment in the amount of five hundred dollars. Without paying, B. moves to Chicago, taking his property before it can be attached. Under the "full faith and credit" clause, A. can go into a court in Illinois, and with simply the judgment of the Michigan court as evidence, obtain a decree against B. in the amount of the judgment. B. may challenge the authenticity of the record; and he may demand a re-trial on the ground that the Michigan court did not have jurisdiction. But on no other ground can he secure a reopening of the case.

Not only judicial findings and decrees, but marriages, wills, deeds, contracts, and other civil actions, come within the scope of the clause under consideration. Two states may have widely differing laws relating to wills; yet each will accept and enforce, when occasion arises, a will made under the laws of the other. On few subjects are the laws of the different states so far apart as on divorce; yet South Carolina, which allows no decree of divorce to be issued by any of its courts for any reason whatsoever, accepts

[1] Art. IV, § 1.

as valid the decrees issued in states whose regulations on the subject are notoriously lax.[1] It should be noted, however, that the "full faith and credit" clause applies only to civil judgments and decrees; the Supreme Court holds that no state is compelled by this provision to lend its aid in the enforcement of the penal laws of another state.[2]

2. Interstate citizenship

The framers of the national constitution were wisely of the opinion that the states ought not to be allowed to abuse their powers by discriminating, in favor of their own citizens, against persons coming within their jurisdiction from other states. Such conduct would be inherently unjust and would seriously impede the growth of national unity. Hence it is provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[3] This means that citizens may move freely about the country and settle where they will, with the assurance that they will not be subjected to special discriminatory taxation, that they will be permitted to carry on lawful occupations under the same conditions as native citizens, that they will not be prevented from acquiring and using property, or denied the equal protection of the laws, or refused access to the courts. It does not mean that privileges of a political nature must at once be extended. "A state," said the Supreme Court in a decision handed down in 1898, "may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office."[4] Moreover, the clause does not prevent a state from making quarantine or other police regulations which will have the effect of denying free ingress or egress or the right to bring property in or to take it out. But such police restrictions must be justified by provable public necessity; furthermore, they must be so framed as to fall alike upon the citizens of the given state and those of all other states. It is hardly necessary to add that a citizen of New York, migrating to Pennsylvania, does not carry with him the rights which he enjoyed in New York. The point is rather that he

[1] W. W. Willoughby, *Constitutional Law of the U. S.*, I, 205-212.
[2] Wisconsin *v.* Pelican Insurance Company, 127 U. S., 265 (1888).
[3] Art. IV, § 2, cl. 1. R. Howell, "The Privileges and Immunities of State Citizenship," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXVI (1918).
[4] Blake *v.* McClung, 172 U. S., 239 (1898).

becomes entitled to such rights as the citizens of Pennsylvania enjoy.

3. Extradition

A third obligation resting on the states is the extradition of fugitives accused of crime. "A person charged in any state with treason, felony, or other crime," says the constitution, "who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."[1] Extradition passed into American constitutional law from international practice; treaties on the subject were not unknown in antiquity, and in the past hundred years they have become numerous. Nations are inclined to stand strictly on their sovereign rights, and international extradition is practiced under certain very definite limitations. In the first place, nations will rarely or never hand over a fugitive unless they have a reciprocal extradition agreement with the nation demanding him. In the second place, they will not surrender him unless the crime of which he is accused is one of those enumerated, for extradition purposes, in the treaty. Furthermore, nations usually refuse to extradite their own citizens or subjects, and by universal usage political offenders are exempted. Finally, it has become an accepted rule that an extradited person cannot be tried for any offense other than that named in the warrant of extradition.

The process

Extradition as practiced by the states means about the same thing, but it is carried out under different conditions. It is provided for by the national constitution, not by interstate agreements; extraditable offenses are broadly defined as treason, felony, and "other crimes"; states commonly give up their own citizens on proper demand; and there is no rule against trying an extradited person for an offense other than that with which he was charged when he was delivered up. The constitution says that the demand for the surrender of a fugitive from justice shall be made by the executive authority of the state from which the person fled, and an act of Congress provides that it shall be addressed to the executive authority of the state in which the accused has been apprehended. If, therefore, A. kills a man in Ohio and flees into West Virginia and is there placed under arrest, the governor of Ohio will send a requisition, accompanied with a certified copy of the indictment, to the governor of West Virginia asking the return of A. so that

[1] Art. IV, § 2, cl. 2.

CHAP. XIII

he may be placed on trial in an Ohio court. If the requisition is honored, the fugitive will be turned over to the Ohio police officer who has been despatched to bring him back.

Limitations

But there is no positive assurance that the demand will be complied with. The constitution plainly says that the fugitive "shall . . . be delivered up," and the act of Congress says, with equal directness, that it "shall be the duty of the executive authority" to cause him to be handed over. Nevertheless, the governor upon whom the demand is made actually exercises his discretion, and many cases of refusal are on record. He may refuse on the ground that the accused will not get a fair trial if returned, or on the ground that the alleged offense is not known to the law of the refuge state; the real reason may be only a personal grudge. But in any case there is no way in which an adverse decision can be overborne. In a case which turned on this question, the opinion of the Supreme Court, rendered by Chief Justice Taney, was that "the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this command created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power." In the final analysis, the obligation of extradition, while clearly imposed upon the states by the constitution, is effective only in so far as the chief executives are willing to make it so. But this does not mean that it is obsolete, or even that it is generally ignored; on the contrary, it is observed in the great majority of cases, and when not observed is usually evaded for reasons which have substantial merit.[1]

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CHAPTER XIV

THE CITIZEN AND HIS RIGHTS

The basis of individual rights

The governments of both state and nation rest directly upon individuals and have as their chief object the regulation of the dealings of these individuals one with another. Neither state nor national government, however, has been endowed with unrestricted power over individual interests and actions. Both are agents to which the people have entrusted large authority; yet both are precluded from exercising many forms of control which governments in other times and places have wielded freely. In other words, the people have large liberties which they have reserved to themselves as against one or both of the governments under which they live. Contrary, furthermore, to the situation in England, where the government can itself amend the constitution, alter its own powers, and make any changes whatsoever in the status of the individual, the liberties of the individual in the United States are protected from governmental interference by enumeration in fundamental laws which national and state governments have no power to modify.[1] The first eight amendments to the national constitution form, in effect, a bill of rights, and a number of other clauses have a similar bearing; while practically every state constitution contains a formal enumeration of rights, or articles tantamount thereto.

Before turning to an analysis of the national and state governments it is desirable, therefore, to look somewhat closely into the question of where the individual man and woman stands in relation to these governments—to inquire what rights he or she has, what privileges, and what correlative duties and obligations. The proposition does not require argument that in the final analysis the most important aspect of any government is, not the form or the method of it, but the position which the merchant, the farmer, the artisan occupies under it.

The inhabitants of the United States fall into two classes, namely, citizens and aliens. We are mainly concerned with the

[1] See p. 76.

The status of aliens

status of citizens; so that only a word on the position of the alien is necessary. As a matter of fact, there is no great difference between the relation of citizens and of aliens to the national and state governments so long as the question of protection abroad does not enter in. By international law and by the public law of all civilized states, the legal jurisdiction of a state (using the term in the general sense) extends over all persons who are for the time being within the districts under its actual control.[1] Therefore the unnaturalized German or Italian domiciled in New York must obey the laws both of the United States and of New York; he must pay the taxes which are paid by citizens; and while, by international custom, he may not be required to serve in the army or to render other services which can appropriately be required only of citizens, he may be called upon to do militia or police duty in defense of the local laws which protect his life and property. These obligations are compensated by rights which international custom has also created. An alien is no less entitled to protection in life and property than a citizen; when injured, he has the same avenues of redress that are open to citizens; he may be denied the opportunity to acquire land, and the ballot is usually withheld from him, but he cannot be discriminated against in any way which international practice stamps as unreasonable; and by complying with certain legal requirements he may himself become a citizen.

Who are citizens?

When one turns to the main subject before us, namely, the rights and privileges of citizens, the first question that arises is, Who are citizens? Curiously enough, this was long a matter of doubt. The constitution, as originally adopted, used the term not fewer than seven times, but nowhere defined it. It mentioned both citizens of states and citizens of the United States,[2] thereby conveying the impression that there were two citizenships rather than one, yet without explaining which was anterior to the other, or which was the more fundamental. For some decades this lack of definiteness caused no great amount of trouble. It was commonly considered that the two citizenships were reciprocal; that is, by residence in a state a federal citizen was *ipso facto* a citizen of that state, and a state citizen was *ipso facto* a federal citizen.

[1] W. W. Willoughby, *Constitutional Law in the U. S.*, I, 244.

[2] "Citizens in each state shall be entitled to all the privileges and immunities of citizens in the several states" (Art. IV, § 2); "No person except a natural-born citizen or a citizen of the United States at the time of the adoption of this constitution shall be eligible to the office of president" (Art. II, § 1, cl. 4).

CHAP. XIV

The state-rights view

The state-rights school, however, gradually developed the view that the two citizenships were separable, that state citizenship was the more fundamental, that federal citizenship was but the consequence of citizenship in some state, and that not every citizen of a state became *ipso facto* a citizen of the United States. This doctrine was upheld by the Supreme Court in the Dred Scott case in 1857, in which the question was whether a state could make a negro one of its citizens and, if so, whether a person thus endowed thereby necessarily became a citizen of the United States, entitled to bring a suit in a federal court. The majority decision was that, although a state might confer on a negro all of the rights and privileges of its own citizenship, this did not make him a citizen of the United States. Indeed, the court went so far as to say, in effect, that negroes, though living in the United States and subject to its jurisdiction, were not, and could not be made, by either state or federal action, citizens of the United States within the meaning of the constitution.[1]

Definition in the Fourteenth Amendment

The bitter controversies over the status of the freedmen at the close of the Civil War led Congress first to give the term "citizen" a statutory definition, and later to take steps to incorporate the definition in the constitution itself. The Civil Rights Act of 1866 recognized as citizens "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed"; and the Fourteenth Amendment, adopted in 1868, provides, more comprehensively, that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This definition, it will be noted, retains the idea of two citizenships, and the Supreme Court has held that the two remain as distinct as before.[2] To be a citizen of the United States, it is necessary only to have been born or naturalized in the country and to be subject to its jurisdiction; there is no requirement of residence. To be a citizen of a state, it is necessary to be a resident of that state; it is not necessary to be a citizen of the United States: all United States citizens residing in a state are, by constitutional provision, citizens of that state, but the state may confer its own citizenship on other persons than United States citizens, and in a number of cases this has been done. Federal and state citizenship, therefore, are not identical. There are United States citizens, *e.g.*, citizens

[1] Scott *v.* Sanford, 19 Howard, 393 (1857).
[2] Slaughter House Cases, 16 Wallace, 36 (1873).

resident abroad, who are not state citizens; conversely there are state citizens upon whom national citizenship has not been conferred.

National citizenship, however, is now primary, state citizenship secondary. The state has only very limited power to determine who shall be, or become, its citizens; it must accept as its own citizens any federal citizen who chooses to take up his residence within its boundaries, and the Fourteenth Amendment forbids it to "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." Furthermore, in relations with foreign powers it is only United States citizenship that counts. When the citizen goes abroad he carries the same form of passport and is entitled to the same protection, whether he lives in New York, Ohio, or California. Since 1868, therefore, the distinction between state citizenship and national citizenship has been of steadily decreasing importance. For all practical purposes, it would be accurate, as it would be decidedly less confusing, to speak of citizens of the United States, but only of residents or inhabitants of the states.[1]

The student of comparative government comes upon many different modes of acquiring citizenship. Thus in Norway aliens appointed to positions in the civil service automatically become citizens; in various Latin American states the purchase of real estate has a similar effect; marriage, adoption, and even prolonged residence, lead in certain countries to the same end. Far the greater portion of citizens in all lands become such, however, either by birth or by a formal process known as naturalization. Historically, the acquisition of citizenship by birth has been determined according to two different principles, both of which find recognition in the present practice of the United States. One of these principles is the *jus sanguinis,* under which the nationality of the child is construed to be the same as that of the parents or one of them, regardless of the place of birth. The other is the *jus soli,* according to which nationality is determined by the place of birth, irrespective of the citizenship of the parents. The *jus sanguinis,* which was commonly followed in antiquity, passed into the Roman law and also the law of the early Germans. Under the influence of feudal ideas, which stressed the relation of the individual to land, the *jus soli* for a time supplanted the rule of blood-relationship. But the revival of Roman law in the later Middle Ages brought the

[1] C. A. Beard, *American Government and Politics* (rev. ed.), 160.

latter again into general favor; and *jus sanguinis* is today the principle according to which citizenship is determined in practically all of continental Europe, and also throughout Latin America.

On the other hand, the *jus soli,* first introduced in England at the time of the Norman Conquest, has continued to prevail there; and from England it was brought, as a part of the common law, to English-speaking America. The Supreme Court early declared that citizenship by birth was to be determined according to this principle;[1] and by stipulating that all persons born in the United States and subject to the jurisdiction thereof should be considered citizens, the Fourteenth Amendment re-enacted the common-law rule and incorporated it in the constitution. The rule has been held to be no less applicable to children born of alien parents who are ineligible for naturalization than to the offspring of parents who are eligible. Thus in the case of United States *v.* Wong Kim Ark,[2] decided in 1898, the Supreme Court declared that a child born of Chinese parents in the United States is a citizen, notwithstanding that Chinese, under United States laws, are incapable of being naturalized.

Both principles followed to some extent in the United States

The doctrine of *jus soli* is, however, not followed completely or exclusively. In the first place, the phrase "and subject to the jurisdiction thereof" sets up a qualification. Thus, children born to foreign diplomatic representatives in the United States are not citizens, because even though born on American soil they are considered to be subject to the jurisdiction of the state which the minister or ambassador represents, and not to the jurisdiction of the United States. But children born in the United States to foreign consuls or to other foreign citizens or subjects residing or temporarily sojourning here are held to be natural-born citizens, for the reason that, being covered by no diplomatic immunity, they are subject to American jurisdiction. In the second place, an Indian whose parents at the time of his birth were subject to the jurisdiction of their tribe is not a citizen, and he can become such only by naturalization, even though he was born within the limits of the United States.[3] Finally, the United States applies the rule of *jus sanguinis,* rather than that of *jus soli,* in the case of children born abroad to any and all persons who are themselves American citizens. An act of Congress passed in 1855 provides that any

[1] Alexander Murray *v.* Schooner *Charming Betsy,* 2 Cranch, 64 (1804).
[2] 169 U. S., 649. Willoughby, *Constitutional Law of the U. S.,* I, 274-279.
[3] Elk *v.* Wilkins, 112 U. S., 99 (1884).

child whose father was an American citizen when the child was born shall itself be deemed a citizen, even though born outside of the country's jurisdiction, provided the father has at any time resided in the United States.[1] The force of this act was somewhat tempered by a statute of 1907 which provides that a person born abroad of American parents shall be entitled to protection from the United States only in case he shall, at the age of eighteen, have recorded at an American consulate his intention to become a resident and to remain a citizen of the United States. Furthermore, the United States will not protect its *jure sanguinis* citizens against the claims of the state in whose territory they were born if that state claims them as its citizens or subjects *jus soli;* and, conversely, children born of aliens in the United States are not protected against the state to which their fathers belonged if it claims them as its citizens *jure sanguinis.*

The second principal mode by which citizenship is gained is naturalization, which means the conversion of aliens into citizens by some special governmental act. Naturalization may be either collective or individual. The most usual form of collective naturalization is the extension of citizenship to the inhabitants *en bloc* of territories annexed by treaty or conquest. Down to 1898, the United States regularly conferred citizenship upon the whole body of inhabitants of the territories which it annexed.[2] In the case of Louisiana, Florida, and Alaska, the treaties of cession provided that the inhabitants should be admitted "as soon as possible to the enjoyment of all the rights, advantages, and immunities of citizens of the United States"; in the case of Texas, all citizens of the hitherto independent state were made citizens of the United States by resolution of Congress; and American citizenship was conferred on the citizens of the former Hawaiian Republic by an act of 1900 which established civil government in the new dependency. On the other hand, the treaty of peace with Spain in 1898 by which the United States acquired Porto Rico, Guam, and the Philippines expressly provided that the cession of these islands should not operate as a naturalization of their native inhabitants, and it delegated the determination of the civil status and political rights of these insular populations to Congress. In later statutes Congress declared the Porto Ricans and Filipinos to be citizens of the respective islands; and it conferred upon the former all, and upon

[1] U. S. Revised Statutes, § 1903.
[2] Except, in the case of Alaska, the uncivilized native tribes.

IAP. V

the latter some, of the privileges and immunities of citizens of the United States. Furthermore, the Supreme Court held that Porto Ricans were not aliens in the sense in which the term is used in the immigration laws.[1] So that, although full American citizenship was not conferred upon them, both Porto Ricans and Filipinos became, in international law, "nationals," no less entitled to the protection of the United States than are full-fledged citizens; and in constitutional law the distinction—at least in the case of the Porto Ricans—was substantially one without a difference. Finally, in 1917, Congress made the Porto Ricans full "citizens of the United States."

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Naturalization is, however, usually individual, rather than collective, and as practiced in all countries it involves the granting of citizenship by a court or an administrative officer after the applicant has fulfilled certain prescribed conditions. The national constitution authorizes Congress to "establish an uniform rule of naturalization"; and although it was at first supposed in some quarters that naturalization was one of the concurrent powers to be exercised by the states as well as by the nation, this opinion was soon recognized to be groundless, and in 1817 Chief Justice Marshall was able to declare that it was not, and "certainly ought not to be," controverted that the power is vested exclusively in Congress.[2]

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The first federal statute on the subject, passed in 1790, was very brief, and for a hundred years much was left to chance, or, at least, to the discretion of the naturalization authorities. As a result, the work was performed in no uniform manner and grave abuses arose. In most states it was necessary to be a citizen in order to be a voter. Party organizations and candidates were, therefore, under strong temptation to procure the naturalization of all alien residents whose votes they could hope to control. One way of evading the law was to equip the alien with forged or otherwise fraudulent naturalization papers, and thus to get his name on the voting list. But the commonest device was to rush candidates through the naturalization process in great numbers on the eve of registration, when there was not time, even if there was the disposition, to inquire closely into the merits of individual applications. It was, of course, in the cities, where aliens were most numerous and where the naturalization authorities were close at hand, that this practice was

[1] Gonzales *v.* Williams, 192 U. S., 1 (1904).
[2] Chirac *v.* Chirac, 2 Wheaton, 259 (1817).

most common; and, as a recent writer has said, the naturalization of foreigners "became one of the regular undertakings of the ward organization: the applicant's petition was made out for him, his witnesses were supplied, the foreigner being nothing more than a participant in formalities which he did not even understand. The handling of fifty or sixty naturalizations per hour was not a rare achievement in New York courts. . . . Under such pressure during the days preceding the registration of voters, all careful scrutiny of petitions was out of the question; and the voters' lists of the larger cities were regularly padded with the names of persons who had not fulfilled the stated qualifications at all."[1]

Improvements since 1906

Following an extensive investigation of the subject by a commission appointed by President Roosevelt, Congress in 1906 passed a law which regulates the conditions and processes of naturalization in great detail,[2] and the frauds of earlier days have almost disappeared. The main features of the present system can be indicated briefly. Under the general supervision of the bureau of naturalization, in the Department of Labor, the work of naturalization is performed by courts of designated grades, *i.e.*, all federal district courts, the supreme court of the District of Columbia, and all state and territorial courts of record which have a clerk and a seal and have jurisdiction in actions at law or equity in which the amount in controversy is unlimited. Canada is the only other country in which the judiciary is employed for this purpose; elsewhere the work is done, as a rule, by administrative officers. The investigating commission of 1905 pronounced the courts unsatisfactory as naturalization authorities, but added that no machinery was available which promised better results. It has often been proposed that the power to naturalize be restricted to federal tribunals, which undoubtedly have exercised it with more care than have the state and territorial courts. But the federal courts have not been above reproach; and the change would give an advantage to aliens in the larger cities, where the federal courts are chiefly located.

Mode of naturalization

The process of naturalization involves three main steps. The first is a declaration of intention to become a citizen, which must be filed with a duly authorized federal or state court at least two years before the applicant is finally examined. The second is the filing of a petition, not less than two years nor more than seven

[1] W. B. Munro, *Government of the United States*, 77.
[2] *U. S. Compiled Statutes* (1918), pp. 653-661.

years subsequently, stating that the applicant has been a resident of the United States for at least five years, and that he is not an anarchist or a polygamist. This petition can be presented only to a duly authorized court within whose jurisdiction the applicant has lived for at least one year immediately preceding. Full information must be given about both the candidate and his family (if he is married), and the application must be supported by affidavits of two citizens testifying to the applicant's period of residence and his moral character. The third step, taken not less than ninety days after the petition is filed, is the hearing and examination by the judge. During the interval the petitioner's claims are investigated by a federal agent, and at the hearing the two sponsors must be present, along with the candidate, to answer any questions that the court may care to put to them. The examination of the applicant may be as searching as the judge desires to make it. But it usually suffices to make sure that all requirements of the law have been complied with, that the candidate is not an opponent of organized government, and that he knows a few fundamental facts about the American political system. Having satisfied himself on these scores, the judge authorizes the clerk of the court to issue letters of citizenship, or "final papers."[1]

Status during and after naturalization

Save in two respects, a naturalized citizen stands on the same footing as a citizen by birth; he is ineligible to the offices of president and vice-president; and in the event that the country of his former allegiance has any claim on him, *e.g.*, for military service, he will not be protected against such claim if he re-enters that country's jurisdiction. The legal status of a person during the interval between filing his declaration of intention and presenting his final petition was long a matter of doubt. Having renounced his former allegiance (as he is required to do when the first step is taken), he cannot expect protection from the foreign country. Yet, not being a citizen, he is not entitled to American protection, should he go abroad and become involved in controversy; and it has been ruled by the national executive that such protection will not be extended. If such a person goes abroad, therefore, he does so practically as a man without a country. As long as he remains in the United States, however, he is better off than the alien, in that he can acquire a homestead on the public lands, which an

[1] H. P. Williams, "The Road to Citizenship," *Polit. Sci. Quar.*, XXVII, 399-427 (Sept., 1912).

alien cannot do, and in four states can vote, which an alien cannot do in any state.

Finally, it must be noted that not all aliens are eligible to naturalization, but only such as (a) can speak the English language and (b) are white persons or "of African nativity or of African descent." The second qualification bars out practically all Asiatics. The Chinese are expressly excluded; the Japanese are excluded by interpretation as not being white persons or of African descent. Nevertheless, as we have seen, children born of Asiatic parents who are resident in the United States and subject to its jurisdiction are citizens by birth.

The rights of citizens are both limited and conditional

In an earlier chapter we have seen that all constitutional governments are limited; that they have only such powers as have been conferred upon them, or, at all events, have not been taken away from them; that various "rights" remain to the individual, not strictly as against the state, but certainly as against the government; that the delimitation of the government's powers and the definition of the individual's rights are usually made in a written constitution, and form, indeed, the main uses of such an instrument.[1] We have seen also that, while it is proper enough to speak of the individual's rights, a citizen has no absolute, or unqualified, rights, even as against the government. The most solemnly guaranteed liberties, as of speech and press, are, after all, valid and enforceable only in so far as they are not so used as to interfere with the equal rights of others or to be a menace to the state itself. Bearing in mind these general limitations, we may briefly inquire what the rights of United States citizens are and upon what bases they rest.

Enumerations of rights

The first thing to be observed is that there is nowhere an enumeration of these rights which assumes to be comprehensive or complete. The national constitution mentions a large number of them, but it expressly provides that "the enumeration . . . of certain rights shall not be construed to deny or disparage others retained by the people."[2] Likewise, the state constitutions contain, as a rule, bills of rights, in addition to scattered clauses touching the subject. But they do not attempt to be exhaustive. The state governments are like the national government in that their powers are confined to those which the people who created them have bestowed upon them. In both cases the people retain

[1] See Chap. vii.

[2] Amendment IX.

CHAP. XIV

not only those liberties and immunities that have been expressly reserved to them, but all others not forbidden and not inconsistent with the instrument under which they are claimed. As a matter of fact, however, practically all individual rights of any considerable importance find mention, express or implied, in the fundamental laws; and these alone call for comment here.

Interstate citizenship

The most far-reaching guarantee is that of interstate citizenship, already described.[1] "The citizens of each state," says the national constitution, "shall be entitled to all privileges and immunities of citizens in the several states."[2] This means, as has been pointed out, that every state is bound to treat newcomers from other states substantially as it treats its own citizens. It determines for itself what the privileges and immunities of its citizens shall be, and it is responsible for their enforcement; it is merely required by the clause cited not to discriminate against citizens of other states who come within its boundaries.

Additional guarantees in the Fourteenth Amendment

However, the matter does not end there. There is national citizenship as well as state citizenship, and the Fourteenth Amendment undertakes to protect national citizens by expressly forbidding any state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Supreme Court has declared that the rights belonging to a citizen of a state as such still depend for their security and protection upon the state. But it has also said that there are rights of citizens of the United States, in contradistinction to those enjoyed as citizens of a state—rights which the Fourteenth Amendment is specially designed to protect against hostile state action, and which it is incumbent upon the national government to uphold. An example is the right to demand protection of life, liberty, and property when on the high seas or within the jurisdiction of a foreign government.[3] Since practically all national citizens are state citizens, and *vice versa*, the benefit of both of the clauses cited accrues to substantially the whole body of the people; and, taken together, the clauses confer, among other things, the right to move freely from state to state; to establish a residence in any state, and to be dealt with like other residents there; to own personal and real property in any state; to sue in the federal courts and in the courts of the state in which one resides; to have free access to both state and national governments, to hold their offices, and to share

[1] See p. 176.
[2] Art. IV, § 2, cl. 1.
[3] Slaughter House Cases, 16 Wallace, 36 (1873).

in administering their functions; and to have the protection of the national government when abroad and of both state and national governments, within their proper spheres, when at home.[1]

Federal guarantees which are not binding on the states

But the national constitution does not stop with the general limitations upon the states which have been mentioned. It contains many guarantees of specially named rights and liberties, of which some are pledged in respect to the national government alone and others in respect to both national and state governments. The distinction between these two categories, while often overlooked, is important, and some illustrations of both deserve to be noted at this point. Take first the matter of religious freedom. Congress is forbidden by the First Amendment to make any law "respecting an establishment of religion or prohibiting the free exercise thereof." The states, however, may adopt regulations on the subject at will; although, in point of fact, their constitutions also commonly contain broad guarantees of liberty of belief and worship. The Supreme Court has held, moreover, that the federal guarantee does not confer the right to violate a criminal statute in the name of religion.[2] Another illustration of the same thing is freedom of speech and of the press. The First Amendment forbids Congress to make any law abridging these liberties. But this does not prevent the states from imposing such restrictions as they like; and public meetings are often broken up and publications suppressed by municipal and other local officials acting under state authority. The state constitutions usually contain guarantees of freedom of speech and of the press. But these rights, like all others recognized by the states, are subject to regulation by law in the exercise of the general police power. Even the national government, in the exercise of its war powers, may go far toward restricting these forms of freedom.[3]

Illustrated by restrictions on judicial processes

Still another illustration is the notable series of restrictions upon judicial processes contained in the national constitution in Amendments IV-VIII. Here it is provided that a person in civil life shall be held to answer for "a capital or otherwise infamous crime" only on "a presentment or indictment of a grand jury"; that in a criminal prosecution he shall be entitled to a speedy trial, by an impartial jury of the state and district wherein the crime shall have been committed; that he shall have a right to

[1] A. J. Lien, "Privileges and Immunities of Citizens of the United States," *Columbia Univ. Studies in Hist., Econ., and Pub. Law*, LIV, 1-94 (1913).

[2] Reynolds *v.* United States, 98 U. S., 145 (1878).

[3] See p. 270.

CHAP. XIV

be confronted with the witnesses against him, to have counsel for his defense, and to avail himself of compulsory process for obtaining witnesses in his favor; that no one shall be compelled in any criminal case to be a witness against himself; that no one shall "be deprived of life, liberty, or property without due process of law"; that excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted; that no one shall be twice put in jeopardy of life or limb for the same offense; and that in civil suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. As stipulated in the amendments named, these guarantees apply only to federal suits, although it should be added that they are generally repeated or imitated in the constitutions of the states.

and restrictions on the right of eminent domain

Finally may be mentioned, as belonging in the same category, the limitations placed by the national constitution upon the exercise of the right of eminent domain. This right involves the power to take private property for public use, with or without the owner's consent. The power is one which every government must have. In the absence of constitutional restraints, however, it would be peculiarly liable to abuse: the compensation might be inadequate,—indeed, compensation might be denied altogether. Hence, the Fifth Amendment forbids private property to be taken for public use without just compensation. The courts, it is true, have usually interpreted this provision very broadly. For example, they uphold the taking of land not only for purposes which are strictly governmental, *e.g.*, the erection of a custom-house, but for purposes which have any clear relation to governmental functions, *e.g.*, the creation of a park; and they raise no objection to the exercise of the power by a railroad or other corporation upon which the government has bestowed it, so long as the same conditions are observed which the government itself would be required to meet. None the less, it is always necessary to show that the purpose is "public," and to make "just compensation." What is to be considered just compensation is likely to be a matter for judicial or administrative determination. The government or corporation will ordinarily make the owner an offer. This is very likely to be refused. Counter-proposals and mutual concessions may lead to an agreement, as in an ordinary sale. But if they do not, the owner can appeal to the courts, which will fix the amount which he may receive and must accept; or the decision may be reached

by commissioners or other administrative boards. All that is necessary to meet the requirements of the constitution is that the dissatisfied seller shall have an opportunity to be heard on the subject and to present such evidence concerning the value of his property as he may desire to bring forward. The Fifth Amendment, containing the restriction here commented on, applies only to the national government. But the state constitutions have similar clauses, which in many instances reproduce the federal provision verbatim; so that the property-holder is, in fact, safeguarded all round.

Immunity from bills of attainder

Turning to rights which are guaranteed in the federal constitution as against both national and state governments, three or four of principal importance are discovered. The first is immunity from bills of attainder.[1] A bill of attainder is a legislative measure which inflicts punishment without a judicial trial. The device was frequently employed in England during the political struggles of the seventeenth century, when not only were persons arbitrarily "attainted" of treason and sent to the scaffold by simple act of Parliament, but their descendants were made incapable of holding office and were in other ways shorn of civil rights. The authors of the American federal constitution felt that, aside from removal from office as a result of impeachment, punishments ought to be inflicted only in consequence of the verdict of a court of proper jurisdiction. Hence nation and states alike are forbidden by the constitution to pass bills of attainder in any form.[2]

and ex post facto legislation

Similarly, there is full immunity from ex post facto legislation. An ex post facto law, as defined by the Supreme Court, is one which "makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action"; or one which "aggravates a crime, or makes it greater than it was when committed"; or one which "changes the punishment, and inflicts a greater punishment than the law annexed to a crime when committed; or, finally, one which "alters the legal rules of evidence and requires less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender."[3] Ex post facto legislation, is therefore criminal legislation passed after the alleged crime was committed, which, if brought to bear against an accused person,

[1] Art. I, § 9, cl. 3.
[2] Cummings *v.* Missouri, 4 Wallace, 277 (1866).
[3] Calder *v.* Bull, 3 Dallas, 386 (1798).

CHAP. XIV

would be to his disadvantage; and the enactment of such legislation is expressly forbidden to both the nation and the states. Retroactive legislation on civil matters, and retroactive criminal legislation which is not detrimental to an accused person, is, however, permissible.

"Due process" as a means of protecting individual rights

Mention has been made of the clause of the Fifth Amendment which forbids the national government to deprive any person of life, liberty, or property without due process of law. In 1868 the Fourteenth Amendment imposed the same restriction upon the states. "Due process" has, therefore, become a palladium of individual rights as against all governmental authorities. Notwithstanding its importance—perhaps it would be better to say *because* of its importance—the phrase has never been officially or legally defined; and the attempt to apply it to the multifold actions and relationships of life has given rise to a stupendous amount of litigation. In his argument before the Supreme Court in the Dartmouth College case Daniel Webster asserted that due process is a principle according to which law "hears before it condemns, . . . proceeds upon inquiry, and renders judgment only after trial."[1] The jurist Cooley expressed the same idea when he said that "in each particular case [due process] means such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."[2]

Due process not defined by the courts

But the courts have not cared to attempt to frame any general definition. Rather, they have preferred, as the highest federal tribunal has said, that "the full meaning [of the phrase] should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise."[3] This attitude has been taken principally because the unending variety of forms assumed by the question as new situations come up makes it impossible to frame a definition that will long have any claim to exactness, and because the interests of justice and progress demand that this rule, pre-eminently, shall be kept flexible and adaptable. Besides, it may be observed that due-process questions usually come to the courts in such form as to call for only a negative sort of definition. An individual or a corporation objects to some action

[1] 4 Wheaton, 581 (1819).

[2] *Constitutional Limitations which Rest upon the Legislative Power of the States* (5th ed., Boston, 1883), 436.

[3] Twining *v.* New Jersey, 211 U. S., 78 (1908).

on the ground that due process has not been observed and that loss has been suffered on that account; and the thing that the court is called upon to determine is, not the scope of due process in general, but whether the action in question was or was not, so far as it went, due process.

What due process means in practice

Due process, however, plainly means that there can be no proceeding against life, liberty, or property without observance of the general rules established in our system of jurisprudence for the security of private rights.[1] In relation to procedure, this means the hearing of every issue, before it is decided, by an authority vested with the appropriate power. It does not mean necessarily a trial by jury, or even a judicial trial at all; the states (though not the national government) may dispense with grand and petty juries, and they may entrust determinations, although admittedly of a judicial nature, to administrative officers or boards. Due process does not necessarily include exemption of an accused person from compulsory self-incrimination,[2] or the right of the accused to be confronted at the time of trial with the witnesses against him,[3] or an opportunity to appeal from a lower to a higher court.[4] In civil matters, the requirements of due process are regarded as having been met if the regular, recognized, course of judicial proceedings has been observed.

Due process and the police power

Questions of due process are most frequently raised by actions performed by states, or by their agents, in the exercise of the police power. Here again, however, it is impossible to generalize. The courts refuse to define the police power, preferring to decide when controversy arises whether any given act is to be construed as coming within the scope of that power. Broadly considered, the power includes the exercise of all regulatory authority which is designed to promote the general well-being rather than special privilege, *e.g.*, protection of life and property, guardianship of public morals, and improvement of public health. In the exercise of this sort of power, the state is not unlikely to restrict the freedom of corporations and of individuals to enter into agreements pertaining to labor and other matters; and this may well raise the question whether liberty has not been taken away without due process of law. When, for example, the legislature of New York passed an

[1] Hagar *v.* Reclamation District, 111 U. S., 701 (1884).
[2] Twining *v.* New Jersey, 211 U. S., 78 (1908).
[3] West *v.* Louisiana, 194 U. S., 258 (1904). This right exists in the federal courts under the Sixth Amendment, but not in the state courts.
[4] McKane *v.* Durston, 153 U. S., 684 (1894).

act forbidding employees to work in bakeries more than sixty hours a week or ten hours a day, the Supreme Court held the measure void on the ground that it transcended the police power of the state and was an "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor" which is covered in the guarantee of due process contained in the Fourteenth Amendment.[1] In the defense of due process, the Supreme Court thus imposes many restraints on the exercise of police power by the states, and accordingly wields large control over industrial and other economic legislation, both of the states and of Congress.

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[1] Lockner *v.* New York, 198 U. S., 539 (1905).

CHAPTER XV

PRIVILEGES OF CITIZENSHIP: THE SUFFRAGE

Nature of privileges

We have thus far dealt with the citizen's claims upon the government for protection and with his immunities from certain kinds of government control—in other words, with the positive *rights* which the citizen possesses by virtue of the national and state constitutions under which he lives. In addition, there are *privileges,* which belong to the citizen, not by any constitutional and enforceable right, but only as a result of special conferment, and only in so far as they have been actually granted. Rights as such are guaranteed and maintained primarily for the benefit of the individual; privileges, and their correlative duties, have in view, rather, the public good. It is, for example, by privilege rather than right that A. practices medicine, or B. teaches school, or C. runs a motor car. With a view to the public interest, the state requires that persons who follow certain professions and trades shall have the requisite training, which is tested by some form of examination. A. has no inherent right to practice medicine; he has only the privilege of doing so, provided he can satisfy the authorities of his state that he is qualified. Furthermore, a license conferred by one state is good only within the bounds of that state, except in so far as other states, out of considerations of comity, are willing to recognize it.

Privileges often mistaken for rights

But it is not simply the practice of the licensed professions and trades that rests upon privilege rather than right. Jury service is a privilege and a duty, not a right which the United States citizen can *ipso facto* claim. There is no such thing as an individual right to hold office; there is only a privilege, conferred by law. It is true that a person who has been duly elected to a public office is usually recognized by the courts as having a property right to the emoluments attached to the position as long as he holds it; and he can be removed only by impeachment or other proceeding authorized (expressly or by proper inference) by law. But he had no original *right* to be elected or appointed to the office, only a privilege; and, unless there is some constitutional restriction, he

CHAP. XV

will have no recourse if the office is suddenly abolished and his tenure is thereby prematurely ended.

The suffrage a privilege, not a right

Another political activity which is a privilege rather than a right is the exercise of the electoral franchise. It is true that advocates of suffrage extension have always been prone to represent voting as a natural, if not a constitutional, right.[1] This argument was heard repeatedly during the long campaign for the enfranchisement of women in our own country. But political scientists are substantially agreed that the composition of the electorate is, in the United States no less than in other lands, a matter to be determined by considerations of expediency, and not on the theory that any particular class or classes of the people have an inherent right to be included; and the courts have repeatedly and unanimously held that the suffrage is not a right necessarily arising out of either national or state citizenship.[2] Nothing is more obvious than that there is, and can be, no necessary and fixed relation between citizenship and voting: children are citizens, but not voters; women are citizens, but until 1920 they were not voters in the majority of states. On the other hand, four states, as we have seen, allow persons to vote who are not citizens.

Suffrage provisions of the national constitution

The national constitution deals with the subject very briefly and simply. Until 1870, its sole provision was that persons voting for members of the lower house of Congress in each state should have "the qualifications requisite for electors of the most numerous branch of the state legislature."[3] The Fifteenth Amendment, adopted in the year mentioned, imposed the first constitutional restraint upon the states in this matter by forbidding any state (or the United States) to deny or abridge the "right" of citizens of the United States to vote "on account of race, color, or previous condition of servitude." The Nineteenth Amendment, adopted in 1920, laid a further restriction by forbidding any state (or the United States) to deny or abridge the "right" to vote "on account of sex."

No uniform suffrage system

The framers of the constitution might conceivably have provided for a uniform national suffrage, quite distinct from the suffrage systems maintained by the several states, as did the makers

[1] W. J. Shepard, "The Theory of the Nature of the Suffrage," *Proceedings of Amer. Polit. Sci. Assoc.*, VII, 106-136 (1913).

[2] United States *v.* Anthony, Fed. Cases 14459; Minor *v.* Happersett, 21 Wallace, 162. These decisions were rendered, in 1873 and 1874, in cases in which the question at issue was the right of women *as citizens* to vote.

[3] Art. I, § 2, cl. 1.

of the constitution of the federally organized German Empire in 1867-71. But they chose, as did the framers of the constitution of the Swiss Confederation in 1848, to utilize for national purposes such electoral arrangements as each state had made, or should subsequently make, for its own use. There is, accordingly, no single suffrage system which covers the entire country. Limited only by the two restrictions that have been mentioned, every state, by means of its own constitution and laws, regulates suffrage qualifications as it desires. The two amendments tend to produce uniformity as far as they go. But outside of their scope unlimited latitude for variation remains.

The suffrage prior to 1815

The history of the suffrage, particularly in the older states, is in the main a record of intermittent extensions of voting privileges to new groups of people—non-property-holders, small taxpayers, ex-slaves, women—although recent enfranchisements have been offset to some extent by new or increased restrictions. As we have seen, the suffrage in the states in the period of the adoption of the national constitution was commonly confined to property-holders, with occasionally a religious test in addition.[1] In consequence, only a minority—in some cases a very slender minority—of the adult male population could vote. Vermont, whose earliest constitution (1777) quaintly provided that every freeman might vote "who has a sufficient interest in the community," was admitted in 1791 as a manhood suffrage state; Kentucky followed in 1792; and in the same year New Hampshire gave up her tax-paying requirements. On the other hand, Tennessee, Ohio, and Louisiana, although western states, entered the Union with property or tax qualifications, and in 1799 Kentucky gave indication of the looming race problem by disfranchising negroes, mulattoes, and Indians. Thus, up to the War of 1812, the country as a whole showed no very decided change in suffrage matters.[2]

Suffrage changes, 1815-60

The period from 1815 to the Civil War, however, saw a general triumph of democratic principles. Appointive offices became elective. Requirements for office-holding were relaxed. Above all, the suffrage was broadened. Conditions of life in the newer communities of the expanding West made political democracy inevitable there; and the older states were gradually led to the same policy by the growth of restless urban populations, by the impatience of the manufacturing and mercantile classes with free-

[1] See p. 113.

[2] K. H. Porter, *History of Suffrage in the United States*, Chap. II.

CHAP. XV

hold qualifications which they could not meet, by the effects of Jeffersonian political thought, and to some extent by the force of the western example itself. The upshot was that property qualifications were relaxed and finally abandoned, tax-paying requirements were given up in all but a few states,[1] religious tests were entirely abolished, and in many states the suffrage was extended to aliens immediately upon declaration of intention to be naturalized. Woman's suffrage was widely proposed, although nowhere adopted at this time; and the benefits of the new laws rarely reached the free negroes.[2] But by 1860 most of the states had approximate manhood suffrage for whites.

Enfranchisement of the negroes

Since the Civil War the suffrage has been broadened mainly by the enfranchisement of negroes, including the freedmen, and by the conferring of the ballot upon women. A few negroes voted in certain northern states before 1860.[3] But the general enfranchisement of people of color came as a result of new constitutions and laws adopted during the Reconstruction era. The southern states acted reluctantly, and only at the behest of Republican leaders of the victorious North. But the voting privileges of the ex-slaves and their descendants, as indeed of negroes in every part of the country, were supposed to be guaranteed for all time by the Fifteenth Amendment, which forbids any state to deny the right to vote on account of race, color, or previous condition of servitude.

The movement for woman suffrage

Demand for the enfranchisement of women was heard as early as the Jacksonian era, and much was made of it in some quarters during the later stages of the abolition movement. No legislature or constitutional convention, however, at this time gave serious attention to the petitions presented to it on the subject; as a rule, proposals of the sort encountered only ridicule. After the Civil War the case was otherwise. The negro had been enfranchised; approximate manhood suffrage prevailed; and the arguments for giving votes to women could no longer be entirely withstood. The first notable triumph of the movement was in Wyoming, where

[1] After Mississippi, admitted in 1817, no new state entered the Union with a property or tax-paying qualification. Property qualifications survived longest in Tennessee (to 1834), Rhode Island (to 1842), New Jersey (to 1844), Virginia (to 1850), and North Carolina (to 1856). Tax-paying qualifications were still maintained in 1860 in Massachusetts (abolished in 1863), Rhode Island, Pennsylvania, and North Carolina.

[2] K. H. Porter, *History of Suffrage in the United States*, Chaps. III, IV.

[3] For the details see A. N. Holcombe, *State Government in the United States*, 80-81.

women were given the privilege of voting for territorial officers on the same terms as men in 1869.[1] On being admitted to the Union in 1890, this territory held to its woman suffrage arrangements, and before the close of the century Colorado, Idaho, and Utah also became equal suffrage states. The movement then slackened. But about 1906 it gathered fresh impetus, and in four years (1910-14) the number of equal suffrage states was raised to eleven.[2]

The Nineteenth Amendment

Meanwhile the suffragists broadened their purpose so as to include general nation-wide enfranchisement. To this end, some urged an amendment of the national constitution requiring a state to submit the question of woman suffrage to its electorate on petition of as few as eight per cent of the voters. Others, feeling that this "states-rights" method was too slow and uncertain, threw their support to the "Susan B. Anthony amendment" (first brought forward in 1869), which proposed to forbid the United States or any state to withhold the ballot on account of sex. The movement finally centered upon the latter plan; and a brief period of sane but determined agitation brought complete success. The Nineteenth Amendment, embodying the Susan B. Anthony proposal, was adopted by Congress in May and June, 1919, and ratified by the requisite three-fourths of the states during the ensuing fourteen months. Proclaimed August 26, 1920, it had its first test at the national and state elections of the following November.

Arguments for and against woman suffrage

Female suffrage was advocated on many grounds. Most women are citizens. Many are property-owners, tax-payers, and managers of estates, and as such have the same interest in economical and efficient government that men have. Many have entered the professions and are doing work formerly done exclusively by men. Large numbers are wage-earners, whose compensation, hours of work, protection against illness and accident, and provision for old age are determined even more fully by legislation and by the action of commissions and other administrative authorities than are the same interests of men. It was argued, too, that female

[1] Kentucky in 1838 and Kansas in 1861 began to permit women to vote in school elections. Other states gradually took similar action, and in 1887 Kansas conferred full municipal suffrage.

[2] In addition to the four states named, Washington (1910), California (1911), Arizona (1912), Kansas (1912), Oregon (1912), Montana (1914), and Nevada (1914). In Illinois (1913) women were allowed to vote at elections to all offices within the control of the legislature, including most local offices, a few state offices, and the office of presidential elector.

enfranchisement is an inevitable result of the new sex equality of our day and would soon be universal among civilized peoples.[1] Finally, it was contended, not only that women ought theoretically to exert a purifying influence in politics, but that in those states and lands in which they possessed the ballot they had already done so.[2] The principal counter-arguments were that woman's place is in the home, and that if she gives time and thought to politics her influence there will be proportionately diminished; that she can wield her greatest power for good socially, and even politically, by non-political means; that the bulk of women were already adequately represented through the votes of their husbands, fathers, and brothers; that the doubling of the electorate would entail greatly increased campaign expenditure and electoral costs; that after the novelty should have worn off women would lose interest and would not go to the polls; and that they would be guided in voting, not by cool judgment, but by sentiment and emotion.

Results

Nation-wide suffrage for women has not been in operation long enough to warrant positive judgments concerning its effects. So far as the results have been disclosed, however, they bear out the experience of those western states in which women have voted for a quarter of a century. This experience is, in brief, that women voters are strikingly like men voters: some are vigilant and intelligent, many are apathetic and uninformed; some are independent, others are willing to take orders from the party manager or boss; many go to the polls voluntarily and with scrupulous regularity, many others do not go unless pressure is applied or inducements are offered. The proportions of the interested and the lethargic, of the well-informed and the ill-informed, do not appear to be very different among women and among men. In short, while it would be impossible to show that woman's enfranchisement has had the bad effects that were predicted for it, it would also be difficult to

[1] As early as 1870 voting privileges were granted to women in municipal and other local elections in England and Wales, Finland, and Bohemia. New Zealand gave women the right to vote in parliamentary elections in 1893, and thereafter the movement won a long succession of triumphs in Australia, Canada, and South Africa. Norway gave women full parliamentary suffrage in 1913, Denmark in 1915, Holland in 1919; and in 1918 Great Britain similarly enfranchised six million women, *i.e.*, all over the age of thirty. P. O. Ray, "The World-wide Woman Suffrage Movement," *Jour. Compar. Legis. and Internat. Law*, I, 220-238 (Oct., 1919).

[2] A careful report on the workings of woman suffrage during the first twelve years in Colorado is presented in Helen L. Sumner, *Equal Suffrage* (New York, 1909).

prove that it has had any large and tangible beneficial results. It is broadly justifiable, but it has not worked, and must not be expected to work, a revolution.[1]

General suffrage qualifications today

Looking over the suffrage systems in the several states at the present time, one notes five main qualifications for voting: age, residence, citizenship, payment of taxes, and education. The age necessary for voting in most parts of the world is twenty-one, and this is the rule in every one of the American states. The commonest requirement concerning residence is that the voter shall have lived in the state at least one year. But several states, especially in the South, require two years; while others, *e.g.*, Ohio, Michigan, Indiana, and Nebraska, require only six months, and Maine requires only three months. In all states except four it is necessary for voters to be citizens; these four permit aliens to vote, with certain slight restrictions, if they have formally declared their intention to become naturalized. Formerly, non-citizens were permitted to vote far more extensively than now. In 1894 sixteen states had such provisions, and in 1914 nine. The number was reduced to its present level during, and as a natural result of, the World War; and since the practice is objectionable on numerous grounds it is likely to disappear altogether from our system. Tax-paying, once a qualification widely maintained, survives as such in only a few states. Arkansas and Tennessee require the voter to be able to show that he or she has paid a poll tax. Pennsylvania requires voters of the age of twenty-two and upwards to have paid a state or county tax within two years of the date of the election. Finally, some southern states make the payment of taxes one of the alternative qualifications which are employed to cut down the negro vote.

Educational qualifications

Educational qualifications were in earlier times unusual. Today, however, they are found, in some form, in almost one-third of the states. Indeed they may be said, broadly, to have succeeded to the position once held by the property qualification, although they operate, of course, to exclude a very much smaller number of people. In 1906 thirteen states had a reading qualification, and eight had a writing qualification as well.[2] Massachusetts today

[1] W. F. Ogburn and I. Goltra, "How Women Vote; a Study of an Election in Portland, Oregon," *Polit. Sci. Quar.*, XXXIV, 413-433 (Sept., 1919); E. Abbott, "Are Women a Force for Good Government?" *Nat. Munic. Rev.*, 437-447 (July, 1915).

[2] J. B. Phillips, "Educational Qualifications for Voters," *Univ. of Colorado Studies*, III, 55-62 (Mar., 1906).

CHAP. XV

requires the voter to be able to read the constitution of the state, in the English language, and to write his or her own name, unless prevented by physical disability, or unless he or she was over sixty years of age when the amendment on this subject was adopted. Connecticut makes the suffrage conditional on ability to read, in English, any article of the constitution, or any section of the statutes, of the state.

The problem of negro suffrage in the South

In one part of the country, *i.e.*, the South, educational tests are used, along with others, mainly with a view to excluding negroes from voting. The endowment of the freedmen with the suffrage at the close of the Civil War produced extraordinary and lamentable results. Led by conscienceless carpetbaggers from the North, and aided by the temporary disfranchisement of white men who had been active in the Confederate cause, the inexperienced and gullible negroes got possession of state legislatures, passed unjust and ill-considered laws, spent money like water on foolish projects, granted away important resources, and in other ways showed their lack of preparation for the exercise of political power. By one means or another the white populations gradually recovered control, although South Carolina, Louisiana, and Florida were unable to send white representatives to Congress before 1876. Restored to ascendancy, the whites bent all effort toward keeping the negroes from regaining power. Negro suffrage had been forced upon them by the victorious North; they were totally out of sympathy with it; outnumbered in many sections as much as four to one, they felt that their security and prosperity were absolutely dependent upon control of their state and local governments. This meant, of course, to contrive some means of preventing the Fifteenth Amendment from having its full intended effect. For fifteen or twenty years the measures employed to this end were extra-legal, and often clearly illegal. Ku-Klux demonstrations, arbitrary arrests on the eve of elections, theft of ballot-boxes, repeating, false counting of votes, and other forms of intimidation and corruption became exceedingly common, and were generally condoned by the authorities, including the courts.

Tests intended to disfranchise the negroes

About 1890 southern people began to feel that the negro's disfranchisement ought to be regularized by legal, and even constitutional, provisions. It would, of course, be contrary to the Fifteenth Amendment to deny the ballot to negroes as such. But by imposing educational or tax-paying tests, carefully devised to

catch the negro without debarring any considerable number of white people, the essential object could still be attained. And the history of the suffrage in the South during the past thirty years has been mainly a story of the adoption and administration of discriminatory regulations of this character. In Mississippi—the first state to incorporate clauses for this purpose in its constitution (1890)—the voter must have paid all taxes assessed against him, including a poll tax of two dollars, and must be able either to read any section of the state constitution or to understand it when read to him and to give a reasonable interpretation thereof.[1] The uneducated negro, being proverbially careless, is more than likely to be unable to produce his tax receipt; on the other hand, the registration officers are prone to "forget" to ask the white voter to produce a receipt. Comparatively few Mississippi negroes, furthermore, can read; still fewer can give an interpretation of the state constitution which will be accepted as "reasonable" by white officials with a strong predisposition against negro voting. If, in replying to detailed personal questions which are put to him, too, the candidate for registration deviates by a jot from the truth, he becomes guilty of perjury, for which he may be disfranchised. Here again the authorities may apply wholly different standards to applicants according to their color.[2]

"Grandfather clauses"

The Mississippi plan has served more or less as a model for other states. It proved, however, to have one drawback. Notwithstanding judicious administration, it did not sufficiently protect the illiterate white; and in certain states this defect has been partially remedied by so-called "grandfather clauses." South Carolina, in 1895, excused for three years from the regular educational test all men, otherwise qualified, who were voters, or whose progenitors were voters, in 1867. The object was frankly to enable the illiterate whites to get their names on the roll of permanent voters, while keeping the negroes from doing so. The Louisiana constitution of 1898, after requiring voters to be able to read and write, or in lieu of that to be the owners of property valued at not less than $300, went on to exempt from both of these qualifications any person who was himself, or whose father or grandfather was,

[1] The requirement of residence, also, has been raised to two years in the state and one year in the election district.

[2] T. F. Jones, "Powers of the Southern Election Registrar," *Outlook*, LXXXVII, 529-531 (Nov. 9, 1907); W. F. White, "Election by Terror in Florida," *New Repub.*, XXV, 195-197 (Jan. 12, 1921).

CHAP. XV

on January 1, 1867, or on any prior date, a voter anywhere in the United States. The benefit of this exemption fell, and was intended to fall, almost exclusively to the illiterate and poor whites.

Merits of the southern procedure

All of the distinctly southern states have brought into service devices of these and other kinds, with the thinly-disguised purpose of making it difficult or impossible for the negro to take part in politics and government; and it is commonly estimated that in most of these states not more than one negro in a hundred actually votes, even at the most important elections.[1] The letter of the Fifteenth Amendment is ingeniously observed, but the spirit of it is flagrantly violated. Speaking broadly, the situation rouses no strong dissatisfaction. Southern whites regard it as natural and inevitable. The disfranchised negroes are, as a rule, indifferent. Even in the North there is no strong disapprobation; in 1904 the Republican party significantly stopped putting in its platform the time-honored castigation of the southern policy. Furthermore, appeals to the Supreme Court have usually been unavailing. In 1892, and again in 1898, the court held that the Mississippi constitution does not discriminate on account of race or color, and hence does not violate the Fifteenth Amendment.[2] On the other hand, a grandfather clause in the constitution of Oklahoma was declared void in 1914.[3] In most cases the grandfather clauses, however, have long since served their purpose, being intended simply as a means of getting illiterate whites on the registration lists, where they have remained. The southern restrictions are objectionable, in that they set up discriminations which are really based on considerations of race, and also in that they are deliberate evasions of the fundamental law of the country. Most southern negroes, however, are poorly qualified for political power; many of them manifest no desire to vote; some of their leaders consider that the race will gain more in the long run by accepting white control; and the heavily outnumbered white populations must be conceded to have the logic of cold facts largely on their side. The initial mistake was made when the freedmen were enfranchised *en masse* sixty years ago.[4]

[1] J. C. Rose, "Negro Suffrage; the Constitutional Point of View," *Amer. Polit. Sci. Rev.*, I, 17-43 (Nov., 1906).

[2] Sproule *v.* Fredericks, 11 South., 472; Williams *v.* Mississippi, 170 U. S., 213 (1898).

[3] Guinn *v.* United States, 238 U. S., 347 (1914).

[4] Members of the yellow race are debarred from voting in so far as they are ineligible for citizenship (see p. 189). American-born persons of that race, however, may obtain the suffrage on the same terms as whites.

Penalty for disfranchisement not enforced

With a view to penalizing states which restrict the suffrage, the Fourteenth Amendment provides that if a state denies or abridges the right of any of its male inhabitants, being twenty-one years of age and citizens of the United States, to vote, "except for participation in rebellion, or other crime," the basis of representation in such state shall be reduced in the proportion which the number of unenfranchised male citizens bears to the whole number of male citizens twenty-one years of age in the state. Attempt has been made to show that this penalty was intended to fall only in case of denial of the suffrage on account of race or color.[1] But the phraseology of the amendment admits of no such interpretation: Massachusetts is quite as liable to a reduction of its quota of representatives in Congress because of its general educational qualifications as is Louisiana on account of its restrictions aimed at the negro. In point of fact, this provision has never been carried out. The average number of voters in the South who elect a representative to Congress is very much smaller than the average number in the North; and loud complaint has long been made, mainly by northern Republicans. Enforcement of the constitutional penalty would, however, raise embarrassing questions and would have doubtful political effects. Consequently, although numerous bills on the subject have appeared in Congress, all have fallen by the wayside at one stage or another..

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CHAPTER XVI

CONSTITUTIONAL DEVELOPMENT

The constitution in constant change

We have now seen how the constitution of the United States was made, what relations it sets up between the nation and the states, and what rights and privileges fall to the citizen living under it. One other matter calls for attention before we turn to a description of the various systems of government—national, state, and local—which operate in accordance with it. This is the modes by which the constitution expands and develops, adapting itself from generation to generation, and even from year to year, to changing ideas and needs. Viewing the constitution in the narrowest possible sense, as simply the written instrument drawn up at Philadelphia in 1787 and put into operation in 1789, there has been a great amount of change: some clauses have become obsolete, and nineteen amendments have been added. Viewing it, however, in the broader and better sense, as the whole body of fundamental rules which directly or indirectly affect the distribution and exercise of sovereign power, the constitution presents the spectacle of a vast, living, growing organism, in constant flux, and defying all attempts of the philosophers to classify it as rigid or static.[1] Four methods of growth are chiefly to be noted: formal amendment, statutory amplification, judicial construction, and usage or custom.[2]

Provisions for amendment

The framers of the constitution of 1787 were far from believing their handiwork perfect. Furthermore, they were sufficiently statesmanlike to know that, however satisfactory the instrument might be considered at the moment, changing circumstances would require alterations in it. On the other hand, they did not want the process of amendment to be so easy as to encourage frequent and ill-considered change. They accordingly devised alternative methods, as follows: "The Congress, whenever two-thirds of both

[1] See p. 40.

[2] Speaking broadly, the state constitutions have developed in the same ways, although formal amendment, including total revision, has played a relatively more important rôle. Their growth may best be considered when we come to describe the state governments of the present day. See Chap. XXXIV.

CHAP. XVI

houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."[1] At one stage of the convention's deliberations Roger Sherman suggested that the consent of all of the states should be required for ratification. This, however, would have meant to perpetuate the mistake made in the Articles of Confederation; and when James Wilson brought forward a counter-proposal that the assent of only two-thirds should be required, a compromise was effected on the present basis of three-fourths.

Actual modes of amendment

Although two methods of initiative and two methods of ratification are provided for, all amendments thus far adopted have been proposed and ratified in the same way: all have been proposed by Congress and ratified by state legislatures. When voted by a two-thirds majority in both houses, a proposed amendment is transmitted by the Secretary of State to the governors of the several states, to be laid by them before the legislatures. Reports of the action taken are sent, in turn, by the governors to the State Department, which, after the necessary three-fourths have been obtained, proclaims the amendment effective as a part of the constitution.[2] It has been established by practice that an act of ratification by a legislature cannot be rescinded by a subsequent legislature. Ohio and New Jersey attempted to withdraw their ratifications of the Fourteenth Amendment, and New York tried to annul its ratification of the Fifteenth Amendment. No one of these efforts, however, was successful. Unlike statutes, amendments are not subject at any stage to veto by the president;[3] and, aside from a restriction pertaining to the slave trade which expired in 1808, no restraint is imposed upon the amending power, save that no state may, without its consent, be "deprived of its equal suffrage in the Senate."

The electorate, it will be observed, has nothing to do directly

[1] Art. V.

[2] *Rev. Statutes of U. S.*, § 205; G. Hunt, *The Department of State*, 168-178.

[3] For the obvious reason that the same majority in Congress which can propose an amendment suffices to override a veto. The Supreme Court ruled on the point in 1794 in the case of Hollingsworth *v.* Vermont (3 Dallas, 378).

with the amending process. Popular demand may lead Congress to put an amendment before the states, and may cause the legislatures to ratify or reject it. But, contrary to the practice which obtains in amending many of the state constitutions, the people do not themselves either initiate amendments or vote on them.[1] If the alternative device of conventions, national and state, were to be used, the electorate would presumably act more directly. It would fall to Congress to say how these conventions should be composed, and it is fair to assume that provision would be made for election of their members by popular vote. This, however, is only speculation, because no regulations on the subject have ever been made.

The first ten amendments

Many hundreds of amendments have been urged upon Congress since 1789, but only nineteen have been adopted. Indeed it would be proper to say that only nine real amendments have been voted, because the first ten so-called amendments were rather additions to the constitution than amendments of it. As submitted to the states, the original instrument was conspicuously lacking in provisions, such as appeared in most of the state constitutions, for the protection of individual rights. The deficiency was immediately noted, and it became a main obstacle to ratification. Hamilton argued in the "Federalist" that, on account of the limited powers granted the national government, no guarantees of the kind were needed. But most people were of a different opinion, and the ratifying conventions in seven of the states formally proposed amendments mainly on this subject, to an aggregate number of one-hundred and twenty-four. Madison was elected to the first Congress under pledge to use his influence to bring about the adoption of a "bill of rights," and in June, 1789, he introduced a long series of proposals looking to that end. Of seventeen amendments voted by the House, twelve were endorsed by the Senate, and ten were ratified by the states. Eight of them embodied the desired guarantees of personal rights; the ninth provided that the enumeration of certain rights in the constitution shall not be construed "to

[1] Opponents of the Eighteenth Amendment, which prohibits traffic in intoxicating liquors, raised the ingenious question whether in states having provisions for the referendum a joint resolution of the legislature ratifying an amendment to the national constitution is not capable of being referred, like any other legislative act. The supreme court of Maine gave the governor a negative answer to the question (*In re Opinion of the Justices*, Maine, 1919, 107 Atl., 673). On the other hand, the supreme court of Washington said that a referendum is permissible (*State ex rel. Muller v. Howell*, Washington, May 24, 1919, 181 Pac., 920).

CHAP. XVI

deny or disparage others retained by the people''; and the tenth was intended to clear up doubts concerning the distribution of powers between the national and state governments. To all intents and purposes, these ten amendments, as has been stated, belong to the main body of the written constitution, and much trouble would have been saved if they had been incorporated in it at the outset.

Eleventh Amendment

The next two amendments were adopted to correct defects which came to light early in the constitution's history. In the case of Chisholm *v.* Georgia the Supreme Court held, in 1793, that a citizen of one state could sue another state in the federal courts. To people of strong states' rights views this was shocking doctrine, and under their influence the Eleventh Amendment was adopted, in 1798, declaring that ''the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'' The prohibition is construed to apply also to suits against a state by its own citizens.

Twelfth Amendment

Whether this amendment was necessary depended on the point of view. But the threatened breakdown, in 1800, of the system of electing the president, because of a tie between Jefferson and Burr, brought a change whose necessity no one could deny. The upshot was the Twelfth Amendment, ratified in 1804, and providing for separate votes for president and vice-president.[1]

Thirteenth, Fourteenth, and Fifteenth Amendments

The first half of the nineteenth century saw vigorous constitution making and revision in the states. But, apart from the amendment just mentioned, no change was made in the national written constitution, notwithstanding that upwards of four hundred proposals made their appearance in Congress. Then came the Civil War, and as a result of it three amendments designed primarily to define and protect the status of a body of people newly injected into the citizenship of the republic, *i.e.*, the freedmen. These were: the Thirteenth (1865), prohibiting slavery; the Fourteenth (1868), defining citizenship, further safeguarding individual rights, altering the basis of representation in Congress, and laying disabilities on ex-officials guilty of rebellion against the United States; and the Fifteenth (1870), restraining the states from abridging or denying the suffrage on account of race, color, or previous condition of servitude.

[1] See p. 234.

Forty-three more years now passed without further alteration of the written fundamental law. Political and social ideas, however, underwent important changes, and of late these reconstructed views, re-enforced by influences arising from the experience of the country in the World War, have led to a new and remarkable series of constitutional amendments. Barred from laying a tax on incomes by a decision of the Supreme Court in 1895 pronouncing an income tax section of a revenue law of 1894 unconstitutional,[1] Congress in 1909 submitted to the states a proposal that the federal legislature be authorized to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration;" and in 1913 this provision—the basis of our present federal tax on incomes—was added to the constitution as the Sixteenth Amendment. It will be observed that the amendment does not say whether an income tax is or is not a direct tax; it simply authorizes such a tax to be laid independently of the restriction elsewhere imposed on direct taxation. In point of fact, the Supreme Court has since declared that a tax on incomes must be regarded as a tax on the *use* of property to produce the income and is, therefore, in its nature an excise tax.

Sixteenth Amendment

The Seventeenth Amendment, providing for direct popular election of senators, dates also from 1913. This mode of election found few supporters in the convention which framed the original constitution. But it began to be earnestly advocated as early as 1826, and after the Civil War the question drew the attention of steadily increasing numbers of people. From 1893 onwards the House repeatedly passed resolutions favoring the change. The Senate held out until 1911. In 1912-13, however, the amendment was carried through, after the two houses succeeded in composing their differences on the amount of supervision to be exercised over senatorial elections by the national government.

Seventeenth Amendment

The remaining two amendments were adopted in war-time and were helped to success by war-time experiences. One, the Eighteenth, in effect abolished the liquor traffic; the other, the Nineteenth, nationalized woman suffrage. The movement to suppress the transportation and sale of intoxicating liquors had long been

Eighteenth Amendment

[1] Pollock *v.* Farmers' Loan and Trust Company, 157 U. S., 429 (1895). Construing an income tax to be a direct tax, the court held it unconstitutional for the reason that by its nature this tax cannot be apportioned among the states "according to their respective numbers," as is required of all direct taxes by the constitution. Art. I, § 2.

CHAP. XVI

going on, and by the time when the United States entered the World War eleven states had constitutional prohibition, ten had statutory prohibition, and five others were about to pass under prohibition laws or amendments. Early in 1917 Congress forbade the manufacture and importation of all spirituous liquors for beverage purposes during the period of the war; and in December of the same year a constitutional amendment was submitted to the states providing that "after one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is prohibited." Ratified by the requisite number of states, this amendment was proclaimed a part of the constitution in January, 1919, and was duly put into effect on July 1 following. The amendment roused bitter opposition and was tested from every angle before the courts. But it was sustained; and the steady growth of the regulatory powers of the nation, at the expense of the states, received fresh illustration.[1] This amendment was unique, too, in fixing a period (seven years) within which it must be ratified by the states in order to become operative.

Nineteenth Amendment

The antecedents of the Nineteenth Amendment, dealing with woman suffrage, have been described.[2] A resolution submitting the amendment in the form in which it was finally adopted was passed by the House of Representatives early in 1918. Despite earnest support by President Wilson, it was twice defeated by the Senate, mainly through the influence of southern members who felt that the question was one to be settled by each state for itself. In the early summer of 1919, however, the two houses came into agreement, and ratification by the states proceeded with such rapidity that on August 26, 1920, the Secretary of State was able to proclaim the amendment a part of the fundamental law. The new suffrage arrangements were, accordingly, effective in the national and state elections of that year. Like the Fifteenth Amendment, and in almost the same words, the new article restricts the control of the states over the suffrage—in the present case, by forbidding the right of citizens of the United States to vote to be denied or abridged by the states (or by the United States) on account of sex.

[1] For a summary of the earlier cases see *Amer. Polit. Sci. Rev.*, XIV, 648-654 (Nov., 1920).

[2] See p. 200.

Criticism of the amending process

Madison believed that the modes of amendment agreed upon by the framers guarded "equally against that extreme facility which would render the constitution too mutable and that extreme difficulty which might perpetuate discovered faults."[1] On the whole, history has borne out this opinion. There has, none the less, been much criticism of the amending process as being too slow and difficult. Decisions do not go by simple majorities. One member more than one-third in either branch of Congress, or one state more than one-fourth, can utterly block proceedings. Indeed it has been computed that, in view of the extremely uneven distribution of population among the states, one-fortieth of the people, living in thinly-settled western states, could frustrate the wishes of the other thirty-nine fortieths.[2] Of some three thousand amendments laid before Congress during the first one hundred and twenty-four years of the constitution's history, only fifteen were adopted. A generation elapsed after the income-tax law of 1894 was declared unconstitutional before an amendment authorizing such a tax could be got through, notwithstanding insistent public demand for a redistribution of tax burdens between the agricultural classes on the one hand and the manufacturing and commercial elements on the other. The amendment authorizing the direct popular election of senators was adopted eighty-seven years after it was first proposed, long after sentiment had widely crystallized in its favor, and, indeed, after numerous states had brought into use extra-constitutional means of attaining the desired object. On the other hand, the woman suffrage amendment was carried about as soon as public opinion was prepared for it; and the prohibition amendment was adopted with notable celerity, considering the innovations of policy and the difficulties of administration which it entailed.

Various changes of the amending process have been proposed with a view to making it easier, speedier, and more democratic.[3] Thus in 1912 Senator LaFollette introduced a resolution providing for the submission of amendments on adoption by a simple majority in each branch of Congress, and for ratification, not by the legislatures, but by a majority of the voting population in a majority of the states, providing this should mean also a majority of the votes cast throughout the country as a whole. Under this plan amend-

[1] *The Federalist*, No. XLIII (Lodge's ed.), 275.
[2] E. Kimball, *National Government of the United States*, 44.
[3] A useful survey is J. A. Smith, *The Spirit of American Government*, Chap. IV.

HAP. VI

ments might be formally proposed, too, by the legislatures or by the voters of ten states. Neither this nor any other alternative to the present system has, however, won the approbation of Congress or of the general public; and the adoption of four amendments, on as many different subjects, within the space of seven years has put an entirely different complexion on the problem. Whereas it was once plausibly argued that to amend the constitution had become practically impossible, some people now feel that the amending power is in danger of being used too freely and frequently.[1]

rowth by tatute

In the United States, as in other lands, the formal written constitution is only the core of a great body of regulations which have to do with the organization and workings of government. Statutory amplification, judicial interpretation, custom—these furnish a very large part of constitutional law as it actually operates; and through them the constitution—using the term in the broad sense—grows far more extensively than through textual alterations of the fundamental document. Statutory elaboration is very common and very important. The framers of the original constitution, being desirous of avoiding what one of them called "a too minutious wisdom," outlined quite distinctly the framework of the new government, but wisely left the details, both of organization and of functions, to be filled in by Congress and by the state legislatures. For example, they assumed the existence of executive departments and twice referred in the constitution to the heads of

llustra- ions

these departments, but they left Congress not only to establish the departments but to determine how many there should be, what they should be called, how they should be organized, and what should be their functions and interrelations. The composition of the two houses of Congress was carefully prescribed, but the time, place, and manner of electing both senators and representatives were left to be fixed by the state legislatures, subject to control by Congress itself;[2] and in a great statute of 1842 on the election of representatives and another of 1866 on the election of senators Congress amplified the constitutional law of this subject in much detail. Again, the judicial power of the United States was vested

[1] J. Tanger, "Amending Procedure of the Federal Constitution," *Amer. Polit. Sci. Rev.*, X, 689-699 (Nov., 1916); J. D. Thompson, "The Amendment of the Federal Constitution," *Acad. Polit. Sci. Proceedings*, III, No. 2, pp. 17-29 (Jan., 1913).

[2] Except that Congress might not regulate the places of electing senators.

in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[1] Aside from the Supreme Court, therefore, the entire federal judicial establishment rests on statutes passed from time to time by Congress.

In short, a very large part of the actual, working governmental system has been created, and may at any time be added to or altered, by ordinary legislative process. The French have a special term for statutes which, while forming no part of the constitutional laws (*i.e.*, the written constitution), are yet something more than ordinary statutes, in that they deal with the distribution and exercise of governmental powers. They call such measures "organic laws." We have no special name for them. But we rely largely on them as a means of keeping the constitution abreast of the ever-changing necessities of political life.

Growth by judicial interpretation

A still more important means of constitutional growth is judicial interpretation. How such interpretation comes about is not difficult to see. Congress, or a state legislature, passes a law, or a national or state official performs an act, whose validity is challenged by some citizen or group of citizens adversely affected. A case is brought into the courts and the law or action is attacked as being unconstitutional; whereupon the judges must decide whether the charge is well based—in other words, whether the measure is or is not in accordance with constitutional provision. To do this, it is, of course, necessary to determine what the pertinent constitutional provisions mean; and this high task the courts boldly and habitually assume. The final arbiter is the Supreme Court. Whatever that tribunal holds to be constitutional *is* constitutional and valid, regardless of what other authorities may think and of what consequences may be entailed for both private and public interests. The decision may be by a bare majority of the justices, *i.e.*, five to four. But it is no less the ruling of the supreme authority on that account, and it settles the matter for all time unless the court later changes its mind. Such a reversal took place in 1871, when the court, with a somewhat altered membership, sustained as constitutional an act of Congress making paper currency legal tender for private debts, notwithstanding that in the preceding year it had said that this act was unconstitutional. Another change of front occurred in 1895, when the income-tax features of a federal revenue law were held to be unconstitutional, notwithstanding that

[1] Art. III, § 1.

CHAP. XVI

the income tax of 1862 had been sustained. Such reversals of judgment are, however, infrequent.

Judge-made law

It is unnecessary to say that this function of interpretation gives the courts, and especially the Supreme Court, tremendous power. In exercising it the judges become the authors of a vast amount of case law, which to all intents and purposes forms a part of the constitution. Some writers, it is true, hold that the courts do not make law. But they explain their position in labored language, and it is better to recognize frankly, with Mr. Justice Holmes, that judges "do and must legislate."[1] Furthermore, there is hardly any limit to the constitutional expansion and adaptation that may arise in this way. A controverted phrase of the constitution is interpreted in such a manner as to give it a content and application beyond that formerly attributed to it. This, in turn, furnishes a point of departure for a farther elongation when the next case comes up. And so the process goes on, the lines of development, as one writer has put it, being "pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began."[2]

Illustrations:

The principal question upon which the interpretative activities of the courts have played in the past hundred and thirty years is the powers of the national government; and it will at once supply some measure of the results of these activities to say that the whole body of implied powers of Congress, as distinguished from the modest list of eighteen powers formally enumerated in the eighth section of the first article, is attributable to this source. Two or three illustrations must suffice; many others will be mentioned appropriately in later chapters. The constitution gives Congress power to coin money and regulate the value thereof. In pursuance of this authority, "hard money," or specie, was put in circulation, but for more than half a century no paper. During the Civil War, however, Congress, hard pressed for funds, authorized the issue

1. Paper money

of bills of credit, or paper money, and undertook to make these notes legal tender; and in 1871 the Supreme Court, as has been stated, ruled that this procedure was constitutional, on the ground that Congress "has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage act." Paper

[1] In dissenting opinion in Southern Pacific Co. *v.* Jensen, 244 U. S., 205 (1917).

[2] W. B. Munro, *Government of the United States*, 61.

money has been legal tender ever since this decision, and for all practical purposes the power to maintain it as such was conferred on the government by judicial decision.

2. National banks

Again, the constitution gives Congress power to lay and collect taxes and to borrow money. It says nothing about chartering banks. But when the constitutionality of the second National Bank came before the Supreme Court in the famous case of McCulloch *v.* Maryland in 1819, the decision was that a national bank is a "necessary and proper" means of carrying out the financial powers conferred upon Congress, and hence is constitutional. Thereupon the hitherto uncertain power of Congress to charter banks became a settled part of the governmental system, and along with it the power to put the functions of these banks beyond the taxing power of the states, to confer on the banks the powers of trust companies, and even to establish a "federal reserve" system.

3. Interstate commerce

To cite one more illustration, the constitution authorizes Congress to regulate commerce "with foreign nations and among the several states." Such regulation, however, could not be carried far before the question would arise, What is commerce? Inevitably, the definition of the term fell to the courts; indeed the Supreme Court has been progressively defining the word for upwards of a hundred years, and the men who wrote and adopted the commerce clause would be surprised to know how far the definition has now got beyond their simple conceptions. As early as 1824 the court declared, in the case of Gibbons *v.* Ogden,[1] that "commerce is undoubtedly traffic, but it is something more—it is intercourse"; and, by judicial construction, to regulate interstate commerce now means to control not only the transportation of goods by rail and water, but the carriage of passengers, the transmission of light and power, the moving of oil through pipe lines, and even the sending of ideas by telegraph, telephone, and wireless. Changing social and economic conditions and opinions have, furthermore, led the courts, in a series of lottery and pure-food-law cases, to concede to Congress the power to withdraw the privilege of interstate commerce altogether from articles whose transportation is believed to conduce to immorality or to be liable to endanger the public health. In short, the power to regulate has been construed to involve the power to tax, and even to prohibit.[2]

[1] 9 Wheaton, 1.

[2] F. J. Goodnow, "Judicial Interpretation of Constitutional Provisions," *Acad. Polit. Sci. Proceedings*, III, No. 2, pp. 1-16 (Jan., 1913). It should be noted that in the discharge of their functions the executive and administra-

CHAP. XVI

Growth by usage

"Time and habit," remarked Washington, "are at least as necessary to fix the true character of governments as of other human institutions"; and so it comes about that another mode by which our national constitution expands and develops is usage or custom. This form of change attracts less attention than the others; it does not—at all events immediately—result in amendments, laws, or judicial decisions. But all the while the working political system is being silently made over by it. An English scholar, Anson, has written a substantial treatise entitled *Law and Custom of the* [*English*] *Constitution,* and another, Dicey, has given us an illuminating exposition of the part which "the conventions" play in English constitutional organization and growth.[1] As has been pointed out, however, extra-legal understandings, practices, and habits enter largely into the workings of all governments —hardly less, indeed, in America than in England itself. Superimposed upon the instrument of 1787 and its formal amendments, upon the laws that amplify and the decisions that extend it, is a great and steadily developing "unwritten constitution," whose rules and usages determine the actual workings of the governmental system quite as truly as do the stipulations of written law —in fact, sometimes more truly, considering that certain usages have as their object the modification or evasion of the written law. Illustrations come readily to mind. The constitution tells us that the president and vice-president are chosen by electors designated by the people, in accordance with a plan which we know to have been specially drawn to avoid direct popular election. Yet every schoolboy knows that the electors really make no choice at all—that they merely register the will of the electorates which they represent. The unwritten constitution requires them to cast their ballots for the candidates of the party which "carried" their respective states. To do otherwise would be a breach of trust. Similarly, the tradition—which can almost be called a rule—limiting a president to two terms has arisen quite outside of the letter of the constitution and contrary to the manifest intention of the framers.

Illustrations:

1. Electoral college

2. Congressional procedure

Congress, too, shows at every turn the effect of established usage.

tive officers also, from the President down, construe constitutional provisions and thereby aid in giving them new and broader bearings. Such rulings, when tested before the courts, are not always upheld. But many of them work permanent changes in the actual governmental system.

[1] *Introduction to the Study of the Law of the Constitution* (8th ed., 1915),

The caucus system rests entirely upon this basis. The same is true of the committee system. The speakership of the lower house is, indeed, provided for in the constitution; but the great powers which the speakers gathered to themselves, and which have to some extent survived the reforms of 1910-11,[1] are the product of usage. Notwithstanding the plain stipulation of the constitution that all bills for "raising revenue" shall originate in the House of Representatives, many such measures in effect start in the Senate.[2] On the other hand, the constitution does not say where appropriation bills shall originate, but as a matter of practice all of them originate in the lower house.

3. Political parties

Perhaps the most striking illustration of all is the development of party machinery. The makers of the constitution did not foresee the rise of permanent political parties of the sort with which we are familiar. Hence the instrument is silent on the subject, and until comparatively late the statutes similarly ignored it. Nevertheless, parties quickly made their appearance, with the result that a vast mechanism—caucuses, conventions, committees, platforms, funds—took its place beside the machinery of government provided for in the constitution, not only supplementing and enlarging it, but, as in the case of the election of the president, actually twisting it from its original character and design. Party procedure is now regulated to some extent by statute. But the very existence of parties continues unknown to the formal constitution except as it is assumed in the Twelfth Amendment.

By way of illustration, we have already noted many of the changes which formal amendment, legislation, judicial interpretation, and usage have made in our working governmental system—in our *constitution,* in the broader sense of the term. Many others will be brought to light in succeeding chapters. It is therefore unnecessary, in closing this account of the modes of constitutional development, to do more than enumerate a half-dozen fundamental lines of growth which the student should bear in mind as he proceeds. They are as follows:

Larger phases of constitutional development

1. The bare outline of a governmental system contained in the written constitution as it came from the hands of the fathers has been amplified and filled in, until it has become one of the most elaborate and complicated plans of political organization and procedure known to history.

[1] See p. 364.

[2] See p. 415.

2. Notwithstanding the rule laid down in the Tenth Amendment on the reservation of powers to the states, the national government has become far stronger than a reading of the written constitution would indicate and than was intended by a majority of the men who made that instrument.

3. While the underlying principle of separation of powers has been maintained, the executive has developed in a specially notable manner, being, as is stated elsewhere, the only one of the three branches which has, on the whole, grown in power at the expense of the other two.

4. The settlement of conflicts of jurisdiction between the nation and the states, unprovided for in the written constitution except in so far as general principles on the subject are laid down, has become a major function of that branch of the national government whose detachment from political strife best fits it for the task, *i.e.*, the judiciary.

5. The popular basis of government—national, state, and local—has been notably broadened, not only through changes of machinery, such as the expansion of the suffrage and the establishment of direct election of senators, but through the growth of a more lively public opinion.

6. In political parties and party organizations a great mass of machinery, subsidiary to the formal governmental system and long unknown to it, has been brought into being with a view to organizing the voters, electing men to office, and transmuting principles and programs into actual governmental policy.

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PART III. THE NATIONAL GOVERNMENT

CHAPTER XVII

THE PRESIDENCY

Plan of the remainder of this book

In foregoing chapters we have dealt with five preliminary subjects to which every student of American political organization and life must give systematic attention, *i.e.*, (1) English and colonial sources and precedents; (2) the formation of the national constitution; (3) the scheme of government embodied in this constitution, considered as a whole; (4) the position occupied by the individual citizen, and particularly the relation which he sustains to the governments, national and state, which have jurisdiction over him; and (5) the modes by which the actual, working system of government, and even the formal, written constitution, adapts itself to changing ideas and needs. With background thus established, we come now to a study of the governments, one by one, which form parts of the general scheme. First the national government will be described; then the state governments; and finally the local governments, urban and rural, which, although legally subordinate to the state governments, have none the less a separate organization and a varying, but usually large, amount of actual independence. Political parties, too, will be given attention. They can hardly be said to belong to the formal governmental system, yet they count for more in determining what the government shall really be and do than do certain institutions for which the constitution and laws expressly provide.

The chapters contained in the present portion of the book are devoted to the national, or "federal," government, whose outstanding characteristic at once suggests a natural mode of treatment. This characteristic is the separation of executive, legislative, and judicial powers, coupled with arrangements for the exercise of each set of powers by distinct, and largely independent, authorities. Our purpose will be best served by taking up, in order, the three great branches of the government which result from this division—first, the executive (considered broadly to include the

CHAP. XVII

agencies of administration), then the legislature, *i.e.*, Congress, and finally, and more briefly, the judiciary. We begin with the chief executive, *i.e.*, the president.

The problem of the executive

The authors of the Articles of Confederation had in mind an extremely simple national governmental system, with powers of such modest proportions that no executive, outside of Congress and its committees, would be needed. Experience soon showed, however, that a separate chief executive was no less desirable in the national government than in the state governments, and when the Philadelphia convention set to work to reconstruct the federal system the principal plans presented for consideration, although differing widely in other respects, agreed in providing for a distinct executive branch. But what should be the form and status of the executive? Here arose many troublesome questions. Should supreme executive power be entrusted to a single official, or should it be vested in a board or commission? How should the executive be chosen? What should be the term, and should more than one term be permitted? In case a single executive was provided for, should a council be associated with him, on the analogy of the governor's council in the states? Above all, what should be the executive's powers, and what relations should the executive have with other parts of the governmental system? No questions that came before the convention roused greater differences of opinion than some of these. On twenty-one different days the general subject of the executive was under discussion; on the method of election alone, more than thirty distinct votes were taken.[1]

A single executive decided upon

A decision in favor of a single, rather than a plural, executive was reached with no great difficulty. Most foreign precedents pointed in this direction, and every one of the American states had a single executive, *i.e.*, a governor or "president"; the plan offered all the advantages of unity, vigor, and concentration of responsibility; while fear of executive tyranny and of monarchical tendencies was allayed by prescribing a fixed term, defining powers, and providing for removal by impeachment. If the executive had been made, as some members desired, nothing more than an agency to carry into effect the will of the legislature, the plural form would probably have been adopted; and this might have led to a parliamentary, or cabinet, type of government, on the English pat-

[1] M. Farrand, "Compromises of the Constitution," *Amer. Hist. Rev.*, IX, 486 (Apr., 1904), and *The Framing of the Constitution*, Chap. XI.

tern.[1] But after it was decided that the executive should be a coördinate branch of the government, drawing its authority independently from the people and charged with many duties besides the enforcement of the acts of Congress, it was both natural and wise to gather power and responsibility into the hands of a single man. The national executive of the Swiss republic is plural, and it has proved satisfactory. But it is of the subordinate, rather than the coördinate, type; that is, it is only an executive committee of the federal legislature.[2]

Term and re-eligibility

Several members of the convention were willing that the president should hold office during good behavior, and Hamilton expressed a preference for life tenure, subject to removal by impeachment. The prevailing sentiment, however, favored a fixed term, and the question narrowed down to a seven-year term without the privilege of re-election or a four-year term with no restriction in the latter respect. At one stage of the discussion the seven-year plan was adopted. But when it became clear that the president was not to be chosen by Congress, the main objection to re-eligibility was removed; and the four-year term was substituted, with no restriction on the number of times that a man might be chosen to the office.

Precedents against a third term

In the course of time a tradition arose which, as every one is aware, practically limits a president to two terms. Washington's advanced age and dislike of party strife led him to refuse to be a candidate for a third term. Jefferson could doubtless have been elected a third time, but he also declined. Jackson's popularity would probably have ensured him a third election; but he publicly endorsed the decision of his predecessors and threw his support to another candidate. General Grant, in 1880, was induced to break with precedent by seeking a nomination for a third, although non-consecutive, term. But the public disapproved, and the effort failed. In 1912 Theodore Roosevelt also sought a third term, after being out of office for four years. President Taft received the regular party nomination; whereupon the Roosevelt following organized a new party, nominated their leader, and launched a campaign which won many more votes than the regular Republican candidate secured. The third-term aspirant was, however, not elected; and while there is nothing to prevent similar attempts in the future, the whole effect of the episode was to confirm in the

[1] See p. 63.

[2] F. A. Ogg, *Governments of Europe* (rev. ed.), 599.

CHAP. XVII

public mind the conviction that two terms for a president are enough.[1]

Proposal for a six-year term

Indeed, some people think that it would be better if the president were not eligible to even a second term. Being eligible, he can hardly escape temptation to shape his course, especially in making appointments and wielding the veto power, with a view to re-election; and in so far as he yields, the country's interests are likely to suffer. President Wilson was elected in 1912 on a platform which advocated a constitutional amendment making the chief executive ineligible for re-election;[2] and in 1913 the Senate, by a vote of 47 to 23, adopted a resolution in favor of an amendment lengthening the presidential term to six years and forbidding any person who had held the office by election or under operation of the law of succession to hold it again "by election." Though favorably reported by the judiciary committee, this proposal did not come to a vote in the House of Representatives, and its revival in the next Congress was similarly barren of result. After the excitement attending the election of 1912 died down, popular interest in the subject subsided. The question, however, is likely to come up again; and we have the assertion of at least one former president that the proposed change ought to be made.[3]

The vice-presidency

The constitution authorizes presidential elections only at regular four-year intervals—not, as in the French republic, whenever a vacancy arises.[4] Accordingly, arrangements must be made for filling out a term in case the president dies, resigns, or is removed by impeachment; and the constitution itself provides for a vice-president, who is to take up the duties of president whenever the office falls vacant or the president is himself unable to discharge them. No president has resigned; none has been removed, although the impeachment proceedings against Andrew Johnson failed by a single vote; and no president has been incapacitated to such an extent or for so long a period as to lead to an assumption of presidential functions by the vice-president, although such a transfer of authority was much discussed after the wounding of President

[1] J. B. McMaster, *With the Fathers* (New York, 1897), Chap. II. In France, where the president's term is seven years, with unrestricted re-eligibility, a one-term tradition is similarly establishing itself.

[2] The candidate did not himself endorse this plank. On the contrary, in a letter written early in 1913 (though not made public until 1916) he declared that a "fixed constitutional limitation to a single term of office" would be "highly arbitrary and unsatisfactory from every point of view." *Amer. Yr. Book* (1916), 34.

[3] W. H. Taft, *Our Chief Magistrate and his Powers*, 4.

[4] F. A. Ogg, *Governments of Europe* (rev. ed.), 390.

Garfield by an assassin's bullet in 1881, and also during the earlier stages of President Wilson's illness in 1919-20.[1] Five presidents, however, have died in office, and five vice-presidents have thus become president.

The vice-president's share in the work of government

The vice-president is elected at the same time and in the same way as the president. Unless an emergency makes it necessary for him to assume the powers and duties of president, he has no constitutional function except to preside over the Senate; even there he is not a member and has no vote except in the case of a tie. Since, however, he may at any moment be called upon to take the helm of the government, it is desirable that he shall be fully informed on the state of public affairs and on the plans of the Administration. Furthermore, his advice ought to be worth something to the president and the heads of departments. When, therefore, President Harding, in 1921, invited the vice-president to sit with the cabinet and to take part in its deliberations, he took a step which might profitably have been taken much earlier.[2] In so far as the new policy tends to exalt the importance of the vice-presidency in the eyes of the people, and especially of the politicians, it serves a decidedly useful purpose; for political parties have been prone to use the office to placate a defeated faction in the contest for the presidential nomination, or to bring on the ticket a representative of a given element or geographical section, or to serve other purposes dictated by party expediency rather than by the thought that the person selected stands a good chance of being called upon to fill the highest office in the land.

Succession to the presidency

But the vice-president himself might die, resign, be removed, or become incapable of attending to public business, leaving the president without a substitute. Moreover, after a vice-president had assumed the presidency there would be no one to step into his place, should necessity arise. Accordingly, the constitution empowers Congress to declare what officer shall, in either of these contingencies, "act as president." The first legislation on the subject, passed in 1792, provided that the president *pro tempore* of the Senate should succeed, or in case no such official should be available, the speaker of the House of Representatives. For sev-

[1] No definition of presidential inability is laid down in the constitution or the laws, and there is no specification of who is to decide when the president's disablement is so serious and prolonged that an acting president is necessary.

[2] John Adams, as vice-president, attended one or two cabinet meetings, and a few other instances of the kind are known. But until lately the practice never established itself.

CHAP. XVII

eral reasons this plan was unsatisfactory. Under its operation, the presidency would devolve upon a person who had been sent to the national capital to be, not an executive, but a legislator. It might also bring the government under the direction of a chief executive belonging to a different party from that to which the president and vice-president had belonged. Still more serious, if both the president and vice-president should die during the interim between the expiration of one Congress and the meeting of the next, there might be no president of the Senate and there certainly would be no speaker of the House. The country went along under this system for almost a hundred years. The death of President Garfield in 1881, some weeks before the newly elected Congress was organized, brought home to the public mind, however, the weakness of the existing law, and in 1886 a Presidential Succession Act was passed withdrawing the officers of the legislative houses from the succession and providing that, after the vice-president, the heads of the executive departments should succeed, in the order of the establishment of the departments, *i.e.*, the secretary of state, the secretary of the treasury, the secretary of war, etc., with due regard for the constitutional qualifications of age, citizenship, and residence. Never as yet, however, has the succession actually passed beyond the vice-president.[1]

Qualifications

Three absolute qualifications for the presidency are prescribed by the constitution. The president must be at least thirty-five years of age; he must have been a resident of the United States for at least fourteen years; and he must be a "natural-born" citizen. In order not to exclude foreign-born citizens who had helped bring the new government into being, *e.g.*, Alexander Hamilton and James Wilson, all citizens of the United States at the time of the adoption of the constitution were exempted from the last-mentioned requirement. But with the passing of the generation which saw the new frame of government adopted, the rule debarring the foreign-born came automatically into complete operation.

Salary and allowances

By constitutional provision, the president receives a salary, whose amount can be neither increased nor diminished during the period for which he has been elected. He is forbidden to receive any other emolument, either from the United States or from any

[1] No provision whatever is made for the situation that would arise if both the president-elect and the vice-president-elect should die or become incapacitated after the electoral colleges have adjourned, but before the fourth of March. Some extra-constitutional and extra-legal device would have to be adopted.

state. But this is construed not to prevent the United States from furnishing him a mansion (the White House), a suite of executive offices, and special allowances for vehicles, furniture, repairs, clerk-hire, and travel, amounting to from two to three hundred thousand dollars annually. Originally fixed at $25,000 a year, the president's salary was raised in 1871 to $50,000, and in 1909 to $75,000. The vice-president receives $12,000.

Immunities

From the president's position as head of the executive branch it follows that his person in inviolable. He cannot be arrested for any offence, not even murder; no court has any jurisdiction over him; he cannot be in any way restrained of his liberty. Only by impeachment can he be removed from office; and only after removal does he become amenable to judicial process. Even while impeachment proceedings are in progress, he cannot be arrested, or forced to appear before the tribunal or to give testimony, or deprived of any of his powers as president.[1]

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CHAPTER XVIII

NOMINATION AND ELECTION OF THE PRESIDENT

Direct popular election rejected by the framers of the constitution

After the Philadelphia convention completed its labors James Wilson, delegate from Pennsylvania, declared that the most difficult question that the makers of the constitution had faced was the method of electing the president; and the opinion is borne out by the fact that, as has been indicated, more than thirty distinct votes were taken on that subject. Three main plans were considered. One was direct election by the people. Gouverneur Morris and a few other delegates warmly advocated this method, but it won small support, because most members believed that the voters, scattered thinly over what already seemed a large country, would be unable to inform themselves on the qualifications of candidates. The delegates of the small states, furthermore, thought that too great advantage would accrue to the large states. Besides, it was feared that direct popular election would result in the triumph of demagogues, which might, in turn, lead to the establishment of monarchy.

Decision in favor of an electoral college

Election by Congress was widely favored, especially by those persons who conceived of the president as merely an officer to execute the laws; and this plan was twice adopted, on one occasion unanimously. But the idea grew that there should be a balance of power between Congress and the president such as could hardly exist if the latter was chosen by the former; and late in the deliberations the convention turned its support to a plan for election by the people, not directly, but through the medium of an electoral college. This plan seems to have been borrowed from Maryland, where, under the constitution of 1776, members of the upper branch of the legislature were selected by a body of electors chosen by the people every five years. At all events, it seemed a happy solution; the method of electing the president became, indeed, one of the few features of the new frame of government that did not have to be defended.

The system originally adopted

The system adopted may be outlined as follows: (1) each state was given presidential electors in number equal to its quota of

senators and representatives in Congress; (2) these electors were to be chosen in each state in such manner as the legislature should direct; (3) at the prescribed time, the electors in each state should assemble and each should cast a ballot for two persons, of whom at least one should be a resident of a different state; (4) the result of this vote in each state should be certified to the president of the Senate, who, in the presence of the Senate and House of Representatives, should open the certificates; (5) an official count having been made, the person obtaining the greatest number of votes should be declared president, and the person obtaining the next greatest number should be declared vice-president; (6) a tie for the presidency should be decided by the House of Representatives, voting by states (each state delegation having one vote), and for the vice-presidency, by the Senate; (7) if no person received a majority of the total electoral vote, the House, again voting by states, should choose from the five highest on the list.[1] The merit of this plan was deemed to lie chiefly in the independent and expert judgment which the electors were expected to exercise in choosing the nation's highest executive officers. Every elector was to be a free agent, charged only with making up his mind upon the qualifications of the available men and casting his votes accordingly.

Changes arising from practice

For a short time the scheme worked as its authors intended. In 1789, and again in 1792, every elector, indeed, wrote the name of Washington on his ballot. But the second votes were scattered, according to individual preference, among eleven men in the first election and four in the second. In 1796 thirteen men received votes, indicating as yet a good degree of independence on the part of the electors. But in 1800 every elector except one wrote on his ballot the names of either Jefferson and Burr or Adams and Pinckney. The reason was that by this time two distinct political parties had come into the field, and each took steps in advance of the popular election to designate its "candidates" for the presidency and vice-presidency, and also to put before the voters of the several states lists of men who, it was understood, would, if chosen by the people, cast their electoral ballots exclusively for the recognized candidates of the party to which the given electors belonged.

The effect was, of course, to defeat the one purpose for which the electoral college existed. Instead of exercising independent judgment, presumably based on superior knowledge, the electors

[1] Art. II, § 1.

CHAP. XVIII

now became merely a body to register, in a formal and perfunctory way, the will of the voters who had chosen them. The rise of political parties, entirely unforeseen by the constitution's makers, had wrought a silent revolution in the governmental system within a decade; without the change of a letter in the fundamental law, indirect popular election had become, to all intents and purposes, direct election. The electoral college has lived on to this day. But it has survived only because most people consider that it does no harm—in other words, because it interposes no serious obstacle to the one thing which it was intended to prevent, *i.e.*, direct choice of the president and vice-president by the people.

The presidential contest of 1800

A way was open for this remarkable transformation without changing a word of the constitution. The rise of parties united in support of given candidates brought to light, however, a defect which could be remedied only by a formal amendment. The electors were to vote for "two persons," without indicating which was favored for president and which was supported for vice-president. Accordingly when, in 1800, the Republicans gave their electoral votes exclusively to Jefferson and Burr, a tie resulted—as, indeed, must have been the case every time the electors of the victorious party concentrated their votes unanimously upon the same candidates. Yet this was precisely what the voters, even by 1800, expected the electors to do. The desire, both of the people and of the electors, in the present situation was that Jefferson should be president; very few wanted to see Burr in the office. Yet, on account of the tie, the House of Representatives must decide between the two men, and there was no guarantee that the choice would conform to the Republicans' intention, especially in view of the fact that the votes (one for each state) would in several instances be cast by men of the opposite political faith. Only with great difficulty, indeed, were the Federalists restrained from wreaking vengeance on their opponents by swinging the election to Burr.

The Twelfth Amendment

Jefferson was chosen. But before another election came round the Twelfth Amendment, adopted in 1804, changed the system by providing that the electors should "name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president." Thereafter the two offices were dealt with separately, and the major difficulty of 1800 could never reappear, although an election might still be thrown into the House. It remained possible, of course, for the president and vice-president to be members of different parties; and that is still possible. But it

will not happen as long as each elector casts both of his votes for the accepted candidates of his own party. The powerful custom which requires the electors to do this can be depended upon to avert an awkward contingency.[1]

Rise of nominating machinery

The change that has been described was brought about by formal constitutional amendment. The rise of parties resulted, however, in other important alterations which grew out of, and still rest upon, mere practice. One of these is the loss of discretionary power by the electors, already mentioned. Another is the development of machinery for the selection of candidates in advance of the popular vote. The framers of the constitution made no provision for nominations. Under the electoral system which they had in mind no nominations were required; the voters were to choose electors whose discretion they could trust, and the electors were to cast their ballots for the two men whom they individually considered best equipped for the nation's highest office. As soon, however, as political parties appeared, nominations became a necessity. A prime object of party is to secure control of the offices as a means of carrying the party tenets into effect. To accomplish this, the party members must concentrate their votes on particular candidates, which, of course, they cannot do unless the candidates to be thus favored are somehow agreed upon in advance of the election. Party rivalry, therefore, presupposes some scheme of nominations.

The congressional caucus

The first device hit upon to this end was the caucus. Caucuses were, indeed, a familiar feature of American politics before 1789. As early as 1763 John Adams commented in his diary on a "caucus club" which met from time to time in the garret of a certain Tow Dawes and chose, *i.e.*, "nominated," selectmen, assessors, collectors, and wardens before they were "chosen in the town." Caucuses played an important part in the Revolution, and by 1800 they had become the usual means of choosing candidates in local, state, and national governments. In the national field, the caucus was composed of the party members in Congress. They, of course, had no express authority to pick candidates. But they were in touch with political sentiment in their respective states, and no other agency was clearly available. A Republican

[1] Incidentally, the rise of parties and the adoption of the Twelfth Amendment relegated the vice-presidency to a lower position in popular esteem than had been intended for it. Originally, *all* candidates were to be considered, presumably, with reference to their fitness for the presidency. But henceforth vice-presidential candidates became a group apart, whose qualifications were inevitably judged on separate and less exacting lines.

caucus is thought to have been held in 1796. At all events, both Republicans and Federalists nominated presidential candidates in this way in 1800 and for two decades thereafter.

Rise of the nominating convention

As a piece of nominating machinery, the congressional caucus was open to serious objections. It acted by assumed rather than delegated power; it gave little or no voice to the party members in states in which the party was in a minority; and it violated the principle that the president should not owe his election to the legislative branch of the government. Protest against it was never lacking; and when, in 1824, it assumed to dictate that the people should support William H. Crawford for the presidency, rather than John Quincy Adams, Henry Clay, or Andrew Jackson, the revulsion was so great that its action was ignored, its candidate was badly beaten, and the caucus itself, as an agency of presidential and vice-presidential nominations, was allowed to drop into complete disuse. For a time, no definite substitute appeared. In 1824, and again in 1828, Jackson, Adams, and other favorites were named by state legislatures, state legislative caucuses, and various unofficial popular assemblages; as late as 1842 Calhoun was placed in nomination (for 1844) by the legislatures of two southern states. Already, however, the demand for the popularizing of party machinery had led in many states to the replacing of the caucus with specially chosen party conventions;[1] and in 1831 both the National Republican and Anti-Masonic parties held national meetings of this nature in preparation for the presidential election of the following year. Candidates were nominated and platforms were adopted; and in 1832 the Democrats fell into line with a convention, although, taking Jackson's candidacy for granted and feeling that the record of his administration formed a sufficient platform, they found little to do save to nominate Van Buren for the vice-presidency. By 1840 the national convention had become the approved means of putting both candidates and platforms before the voters; and such it has remained.

To understand the way in which presidential and vice-presidential candidates are nominated nowadays it is therefore necessary to know something about the national convention—its call, its composition, its organization, its procedure, its merits and defects.

[1] Occasional state conventions are on record as early as 1792, and in New Jersey the convention system was regularly used after 1810. General adoption of the system in the states came, however, only after 1820.

The nominating convention

The national conventions of the two great parties, and of at least such minor parties as have been in the field for some time, are held at the call of the national party committee. The Democrats have had such a committee since 1848 and the Republicans since the first appearance of their party in a presidential campaign in 1856.[1] Both Democratic and Republican national committees consist of one member from each state and territory, chosen for a term of four years. Democratic committeemen are elected either by the national convention or by state conventions, according to the independent decision of the party in each state. Republican committeemen are elected by the national convention—each delegation nominating the representative of its state or territory—with the qualification that when the law of any state provides a method for the selection of members of national party committees, the nomination of a committeeman by this method is considered a nomination by the state's delegation and is acted upon by the convention as such.[2] In December or January preceding a presidential election the national committee meets in Washington, decides upon the place and date of the ensuing convention, and requests the party members and supporters to choose delegates and alternates according to the apportionment contained in the call. The call is officially communicated to the state committees, and is, of course, published widely in the newspapers. The convention is commonly set for June or early July of the election year, and the place is chosen, usually from a list of competing cities, with a view to the financial assistance and other facilities promised, sometimes also in the hope of influencing political feeling in a given section of the country.

Number of delegates

For some time before 1852, the number of votes allotted to each state in a national convention was usually equal to the number of the state's senators and representatives. From 1852 to 1872 the state delegations in the Democratic convention consisted of twice this number, but each delegate had only a half-vote. Since 1872 the number has remained the same, but each delegate has had a whole vote; and this was also the practice of the Republicans from 1860 until after the convention of 1912, when, as will be explained presently, some reductions began to be made in the dele-

[1] It is hardly necessary to say that the Republican party here referred to is the present-day party of that name, not the Jeffersonian Republican party mentioned above.

[2] *Official Report of the Proceedings of the Seventeenth Republican National Convention* (New York, 1920), 74.

gations sent by the southern states. Four delegates in each case, corresponding to the state's representation in the Senate, are known as delegates-at-large; the remainder are known as district delegates.[1] Furthermore, the District of Columbia and all territories and dependencies are represented. The convention is, therefore, a large body: the Republican assemblage of 1920 contained 984 delegates, the Democratic gathering contained 1,094. For every delegate, too, there is an alternate, who, however, takes part only upon occasion as a substitute.

Reapportionment of delegates in the Republican convention

Notwithstanding the purely party character of the national convention, its membership was formerly apportioned roughly according to total population, and not at all according to party strength. In the case of the Democrats this is still true, and some serious instances of over-representation and the reverse can be cited. Democratic strength is, however, distributed rather generally over the country, and the system as a whole is moderately satisfactory. In the Republican convention the plan formerly produced extraordinary results. One great section, *i.e.*, the South, yields few Republican popular votes and, with rare exceptions, no Republican electoral votes at all. Yet states of that section formerly sent more delegates to Republican conventions than some northern states which unfailingly roll up substantial Republican majorities; they had much weight in selecting candidates and making platforms, but contributed little or nothing to party victory. In the convention of 1908 South Carolina had eighteen delegates, Maine had twelve; but the former state mustered only four thousand Republican popular votes in that year, and of course no electoral votes, while the latter yielded sixty-seven thousand popular votes and six *i.e.*, all, of her electoral votes. In other words, 220 Republicans in South Carolina had as much voice in nominating Mr. Taft for the presidency as did 5,580 in Maine. Other comparisons could be drawn showing equal, or even greater, disparity.

For many years, protest against this inequitable arrangement was fruitless, although scarcely a meeting of the national committee took place at which the subject was not discussed. The desire of the party to increase its strength in the South, and the fear of alienating such supporters there as it had, restrained it from action. The disproportionate and dubiously employed power of the

[1] If a state happens to have a congressman-at-large (see p. 339) it is entitled to two additional delegates-at-large. For the provision made by the Republicans for still other delegates-at-large in future conventions see p. 239.

southern delegations in the Chicago convention of 1912, however, stimulated criticism that could not be silenced, and the party managers gathered belated courage to attack the problem. As a result of changes subsequently agreed upon, the representation of southern states in the national convention will be smaller, by approximately one hundred delegates, in 1924 than it was in 1912. Readjustments made in 1921 alone cut off a net total of twenty-two delegates. Under the new arrangements, each state, whether northern or southern, will be entitled, as heretofore, to four delegates-at-large and to two additional delegates-at-large for each congressman-at-large from the state; and, by a new provision, to two more delegates-at-large in case the state gave its electoral vote, or a majority thereof, to the Republican presidential nominee at the last preceding election. Furthermore, each state will be entitled to district delegates as follows: (1) one from each congressional district maintaining therein a Republican district organization and casting 2,500 votes or more for any Republican elector in the last preceding presidential election, or for the Republican nominee for Congress in the last preceding congressional election, and (2) an additional delegate for each congressional district casting 10,000 votes or more for any Republican elector in the last preceding presidential election, or for the Republican nominee for Congress in the last preceding congressional election, or having elected a Republican representative in Congress at the last preceding congressional election. Under these rules many northern states have a considerably increased representation, most southern states have a sharply diminished representation,[1] and, although inequalities survive, the convention's membership far better reflects the distribution of actual party strength.

Methods of choosing delegates

Originally, delegates to national conventions were chosen variously by mass-meetings, caucuses, and district and state conventions. But under the leadership of the Ohio Whigs it became customary to elect the delegates-at-large in state conventions and the district delegates in conventions held in the several congressional districts. Until 1912, the Democrats never cared to adopt a uniform rule on the subject, and their practice showed considerable

[1] The number of delegates from certain southern states has been reduced as follows: Alabama, from 24 to 14; Texas, from 40 to 21; Georgia, from 28 to 10; Louisiana, from 20 to 10; and Mississippi, from 20 to 4; and the total number of delegates from ten southern states in 1924 is fixed tentatively at 125, as compared with 147 in 1920. The apportionment is tentative, for the reason that some changes are likely to be entailed by the results of the congressional elections of 1922.

CHAP. XVIII

variation. For example, in New York and several other states all of the delegates were formally chosen in the state convention, although the delegates from each congressional district were nominated by the members of the state convention from that district. As early as 1884, on the other hand, the Republican national committee began to require uniform use of the convention system for the choice of delegates-at-large, and in 1888 the rule was adopted that district delegates should be chosen in the same way in which congressmen were nominated, which at that time was practically tantamount to requiring selection by district conventions.

The presidential primary

Shortly after 1900 the direct primary began to be used in various states in nominating candidates for state and local offices, and inevitably the question arose of applying the new device to the choice of delegates to the national conventions. Such a step was first taken in Oregon in 1910, and by 1912 presidential primary legislation had been enacted in a total of twelve states. In view of this development, the Democratic national convention of 1912 formally accepted the primary, conducted under either state law or party rules, as the legal method of selecting delegates to the national convention in 1916. The Republican convention of 1912 refused to seat certain delegations chosen under direct primary laws, on the ground that these laws were in conflict with the long-established rules of the convention which required the election of delegates by district and state conventions. This position could not, however, in the long run be maintained; and at a special meeting held in December, 1913, the national committee formulated a new rule, which was afterwards adopted, recognizing as valid the credentials of delegates chosen in direct primaries where such primaries were established by state law. By 1920 some twenty states had presidential primary legislation. Considerable differences, however, appear. Thus, Vermont, Michigan, Indiana, and Maryland merely provide for a preference vote at the same time that delegates are chosen to the state convention, leaving to that body the choice of the delegates to the national convention; in New York and New Hampshire delegates to the national conventions are elected in the primaries, but there is no direct preference vote; while in Illinois, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Wisconsin, and several other states delegates are elected directly,[1] and there is also a popular preference vote.

It has often been proposed that the presidential primary, in

[1] Except delegates-at-large in Illinois.

Future of the primary

some one of its many forms, be made nation-wide by federal law. In his first annual message, December 2, 1913, President Wilson urged a plan which would enable the people to nominate directly and would make of the national convention only a gathering of party officers and nominees for the purpose of drawing up the platform; and several bills looking in this direction were introduced in Congress. There are, however, obstacles. Constitutional difficulties would arise; and experience with the primary in all fields of government has been less satisfactory than the reformers expected. The presidential primary has, indeed, been abandoned, after trial, by two states, Iowa and Minnesota. Advocates of the system rightly point out that it has been tested only for a short time, over a limited field, and under haphazard arrangements which have greatly interfered with its operation. None the less, no sure future can be predicted for it.[1] Meanwhile the members of our national conventions continue to be chosen in almost equal numbers under the two rival plans, and the conventions themselves show but little practical effect of the application of the primary principle.

Physical surroundings of the convention

The convention of a major party meets in a great hall, lavishly decorated with flags, bunting, and portraits, and capable of seating usually ten or twelve thousand people. The delegates are accommodated on the main floor, grouped around placards bearing the names of their states; the alternates are seated directly back of them; representatives of the press are given generous space; and the galleries are occupied by the thousands of spectators who are fortunate enough to obtain tickets of admission. "A European," says Lord Bryce, "is astonished to see nine hundred men prepare to transact the two most difficult pieces of business an assembly can undertake, the solemn consideration of their principles, and the selection of the person they wish to place at the head of the nation, in the sight and hearing of twelve thousand other men and women. Observation of what follows does not lessen the astonishment. The convention presents in sharp contrast and frequent alternation the two most striking features of Americans in public—their orderliness and their excitability. Everything is done according to strict rule, with a scrupulous observance of small formalities which European meetings would ignore or

[1] For a full discussion of the subject see R. S. Boots, "The Presidential Primary," *Nat. Munic. Rev. Supp.*, IX, No. 9 (Sept., 1920). Cf. F. W. Dickey, "The Presidential Preference Primary," *Amer. Polit. Sci. Rev.*, IX, 467-487 (Aug., 1915).

despise. . . . Yet the passions that sway the multitude are constantly bursting forth in storms of cheering or hissing at an allusion to a favorite aspirant or an obnoxious name, and five or six speakers often take the floor together, shouting and gesticulating at each other till the chairman obtains a hearing for one of them."[1] Bands play popular airs; noisy and spectacular "demonstrations" are set on foot by supporters of "favorite sons" or other aspirants; cheering is sometimes kept up for as much as an hour, until sheer physical exhaustion silences it. It is only because most of the real work of the conventions is done behind the scenes—in committee rooms, in the living quarters of influential delegates, indeed wherever private conferences can be held and understandings reached—that the body does not become a mere mob, incapable of performing its functions.

Temporary organization

The sessions usually extend over three or four days. On the first day the body is called to order by the chairman of the national committee, who, after prayer has been offered and the call for the convention has been read by the secretary of the national committee, announces the list of temporary officers agreed on in advance by that committee. Other nominations may be made, but as a rule the committee's slate is accepted without a contest. The temporary chairman then delivers a speech, prepared before the convention met, in which he eulogizes the party, assails the record of its opponents, urges harmony, and in general sounds the "keynote" of the proceedings. Pending permanent organization, the rules of the convention held four years previously are adopted; and the day's work closes with a roll-call of the states and territories, whose delegations, one by one, announce through their chairmen one of their members to serve on each of the four great committees: (1) credentials; (2) permanent organization; (3) rules and order of business; and (4) resolutions, or platform—although the less wearisome plan is sometimes followed of permitting the chairmen of the several delegations merely to hand in written lists of committee assignments.

Committee reports

The next sessions, extending over at least one day, are devoted to receiving and acting on the reports of these committees. The committee on rules and order of business submits a body of rules based on those of the House of Representatives, together with an order of business which adheres closely to past practice; and its report is usually accepted with little or no discussion. The com-

[1] *American Commonwealth* (3rd ed.), II, 193.

mittee on credentials has the difficult task of awarding contested seats, supposedly on the basis of evidence filed in advance with the national committee. Sometimes, as in the Republican convention of 1912, contests are numerous; and according as they are decided the scale may be turned for or against control by a given element of the party, or for or against the nomination of a given candidate. Hence, although the list made up and reported by the committee is usually accepted, heated controversy may ensue and the committee may be overruled.[1]

The next step normally—although sometimes it is taken before the list of approved delegates is fully made up—is to effect permanent organization. The committee on that subject reports, nominating a list of permanent officials; and usually the persons named are elected without debate. The permanent chairman will have many difficult decisions to make, and he must be both a master of parliamentary law and a man of energy and decision. His first duty, however, is to make a lengthy speech on the issues of the day.

Framing the platform

Finally, the committee on resolutions reports. As a rule, some of the leading delegates bring to the convention trial sets of resolutions,[2] and with these in hand, reenforced with no end of suggestions and admonitions from both delegates and outsiders, the committee labors, often through an entire night, to shape up a platform that will meet the convention's approval and please the voters. If possible, a platform is reported unanimously. Occasionally, however, there is a minority report; and in any case the committee's work is closely scrutinized on the floor of the convention, and is likely to be debated at some length, with or without resulting changes. The platform deals with a wide range of subjects, often including matters that lie wholly outside the jurisdiction of our government; and it is apt to be written in terms of broad generalization, with much appeal to party loyalty and to other sentiment. Its main object is not to lay out a definite program to be followed by the party if it is entrusted with power, but rather to gratify the faithful with a reiteration of time-honored

[1] In the interest of harmony, two contesting delegations from a state are sometimes admitted, each member having a half-vote.

[2] In 1920 the Republicans set up, in advance of their convention, a committee of inquiry composed of well-known members of the party and charged with the duty of canvassing public opinion on questions likely to call for treatment in the platform. A list of topics was made out, sub-committees were appointed, and questionnaires were sent to large numbers of people. The tabulated results were placed at the disposal of the platform makers.

CHAP. XVIII

principles, to placate differing wings and factions, and to persuade sundry particular groups that the party is their friend.

Nomination of candidates

This brings the convention, by the third or fourth day, to its main objective, *i.e.*, the nomination of candidates. The secretary calls the roll of states, beginning with Alabama, and each delegation, in its turn, has an opportunity to place a candidate in nomination. If the delegates of a state which stands near the top of the list choose to do so, they may yield to a delegation which otherwise would have no chance to make a nomination until later; and this may give a distinct advantage to the candidate of the state thus favored. As a rule, two or three eulogistic speeches are made in behalf of each candidate; and all possible effort is put forth by the orators and by the delegates and spectators supporting a given candidate to rouse enthusiasm for him. Noisy demonstrations, sometimes spontaneous, but usually carefully prearranged, interrupt the proceedings for periods up to, and even exceeding, an hour. As many as ten or a dozen candidates may be nominated, although the number rarely exceeds five or six.

The "unit" and "two-thirds" rules

When all the nominations have been made the convention proceeds to vote.[1] The roll of states is again called, and the delegations, through their chairmen, announce their votes. Under Republican practice, each delegate may vote as he likes and have his vote separately recorded; although, in point of fact, a delegation commonly casts its entire quota of votes for a given candidate. The Democrats have followed a different plan. Formerly they permitted the state convention to require the delegates to the national convention to cast their votes in a block for one candidate; and even if no such requirement was imposed, the delegation itself might, by majority vote, determine how the electoral votes of all of its members should be recorded. This historic "unit rule" conformed to the states' rights antecedents of the Democratic party, and it had the practical advantage of augmenting the power and importance of a state in the convention's proceedings. The rise of the presidential primary made it, however, impossible to apply in all cases; and the national convention of 1912 modified it in so far as to permit freedom of individual voting on the part of delegates from states which require by law the nomination and election of delegates in congressional districts and have not subjected delegates so chosen to the authority of the state committee or the

[1] No printed or written ballots are used in national conventions; all voting is oral. The term "ballot" is, however, commonly used to designate a vote.

state convention.[1] Another important difference of practice between the two major parties is that whereas a simple majority of all votes cast is sufficient to nominate in a Republican convention, the Democrats require two-thirds. The "unit rule" and the "two-thirds" rule are closely connected. As long as the former is maintained, the latter is practically necessary to prevent a few large states from completely controlling the nominations. But there has been strong demand for the abrogation of both.

The balloting

After the votes of all of the states have been recorded and counted, the result is announced. Sometimes a single ballot suffices. But more often the votes are so distributed among several candidates that no one has the requisite majority and other ballots must be taken. Gradually, as the voting proceeds, candidates whose cause is recognized to be hopeless cease to have more than a straggling support or drop out altogether, and their votes are thrown elsewhere, until at length some one of the contestants emerges a victor. Sometimes the contest is very prolonged. Forty-nine ballots were required to nominate Franklin Pierce in 1852, and fifty-three to nominate General Scott in the same year. Garfield was nominated on the thirty-sixth ballot in 1880, and Woodrow Wilson on the forty-sixth in 1912.

Nominating the vice-president

The nomination for the presidency having been made, the wearied convention hurries its work to a conclusion. It remains to make a nomination for the vice-presidency; and the same procedure—roll-call, nominating and seconding speeches, and balloting—is followed. But the contest is usually not very keen, and a decisive vote is soon reached. As a rule, the choice is determined largely by the relative "availability" of the candidates in the light of the selection that has been made for the presidency. An eastern presidential nominee, for example, calls for a western vice-presidential nominee; an arch-conservative must be counterbalanced with a man of known liberal views. If the vice-presidential candidate will improve the party's prospects in a doubtful state or group of states, or will lend popularity to the ticket the country over, so much the better. But, in the words of a recent writer, the office is "lightly esteemed and carelessly bestowed."

Having elected the new national committee, the convention authorizes the chairman to appoint two special committees consisting of a representative from each state to bear formal notification to the candidates; and thereupon it adjourns *sine die*.

[1] *Official Report of the Democratic National Convention of 1912*, 59-76.

The campaign

At an early date the new national committee meets, and a chairman is chosen, nominally by the committee, though actually by the presidential candidate. In due time sub-committees and auxiliary committees are designated; a treasurer is appointed; headquarters are opened, usually in both an eastern and a western city; a "campaign text-book" (containing the platform, notification and acceptance speeches, biographies of the candidates, statistics and testimonials tending to substantiate party arguments, and much miscellaneous material) is published and widely distributed; a speakers' bureau is organized; and under the supreme direction of the national chairman an appeal for votes is launched which is kept up, with increasing ingenuity and intensity, throughout the four months or more during which the campaign lasts. Meanwhile in each state the parties make up their lists of presidential electors, in some states by the use of the primary, in others by convention nomination; and ballots are prepared on which the lists of electors are printed in parallel columns, under the appropriate party symbols. When the people finally go to the polls, they think of themselves as voting for president and vice-president; and, barring certain contingencies to be mentioned, they do actually determine who shall fill these two offices. In form, however, they vote only for electors; and frequently the names of the presidential and vice-presidential candidates nowhere appear on the ballot.[1] In 1920 the total number of men and women of voting age (without reference to other qualifications) was about fifty-four millions, and the number of votes cast for all tickets was about twenty-six millions.

The choice of electors

By national law of 1845, presidential electors are chosen in all states on the same day, *i.e.*, the Tuesday following the first Monday in November; and an act of 1887 requires the electors to meet and vote in all states on the second Monday of the following January. There is no national law, however, on the method of choosing the electors. On the contrary, the constitution prescribes that this shall be determined in each state by the legislature thereof. Originally, the choice was made in most cases by the legislature itself; in 1792 the legislature elected in nine states,the people in five. But the principle of popular election gradually won favor, and after 1832 the electors were thus chosen in all states except South Caro-

[1] On the other hand, at least two states (Nebraska and Iowa) omit the names of electors from the ballot and print only the names of the presidential and vice-presidential candidates.

lina, where the legislature continued to elect until after 1860.[1]

District and general ticket systems

In states in which the electors were from the first chosen by the people it was at one time not unusual to employ a district system, under which one elector was chosen by the voters of each congressional district and two were elected by the voters of the state at large. The competition of political parties, however, caused this plan to lose favor. Under the district system the electoral vote of a state was likely to be divided among two or more candidates. To win the full vote it was necessary for a party to carry every district. The alternative was, of course, a general ticket system, under which a party could make a clean sweep merely by securing a plurality throughout the state as a whole. Enhancing, as it did, the general importance of a state in national politics, this plan won the support both of party leaders and of public sentiment. In 1832 only four states retained the district system; and they soon gave it up. Michigan adopted it in 1891, but only temporarily.[2] The general ticket system does not, it should be noted, absolutely preclude division of a state's electoral vote. A sufficient number of voters may "scratch" the ticket, *i.e.*, vote for electoral candidates on two or more lists, to prevent any party from securing all of the places. This actually happened in California in 1912. But such results are rare.

"Minority" presidents

A plurality wins; and this leads to mention of the noteworthy fact that many presidents have been "minority" presidents, in the sense that they (strictly, the electors who chose them) were voted for by fewer than half of the people who went to the polls. Lincoln, in 1860, obtained only a plurality, not a majority, of the popular vote. Wilson, in 1912, received two million more popular votes than did his nearest competitor, Roosevelt; yet he lacked a majority. In both of these cases the opposition was unusually

[1] Colorado temporarily reverted in 1876 to the legislative method.

[2] The Democratic legislature of a state which was normally Republican sought in this way to ensure that in the approaching presidential election the Democrats would secure a share of the electoral votes. The plan succeeded; nine Republican and five Democratic electors were chosen. But when the Republicans regained control of the legislature the general ticket system was reinstated. The general ticket system gives an enormous political advantage to the party that is dominant in a state. A reversion to the district system is, accordingly, always pretty certain to be temporary; "when the normally dominant party regains control of the legislature the law is repealed, or if the party that enacted it becomes dominant it is for the same reason repealed." J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 687 (Nov., 1917). The Michigan law of 1891 was sustained by the Supreme Court in McPherson *v.* Blacker, 146 U. S., 1 (1892).

CHAP. XVIII

divided. But the same thing can happen under entirely normal circumstances, even if there are but two tickets in the field. Hayes was elected over Tilden in 1876, although his popular vote was smaller, whether the Republican or the Democratic count be accepted; and Harrison triumphed over Cleveland in 1888, although with one hundred thousand fewer votes. Indeed, in the last eleven elections the successful candidate has received a majority of the popular vote only six times. All that a candidate needs in order to obtain the full electoral vote of a state is a plurality of the popular vote in that state. Popular pluralities, no matter how small, in a sufficient number of states—and no very great number, if the list includes states, like New York, Pennsylvania, and Illinois, having numerous electoral votes—ensure election. Wilson's six million popular votes in 1912 were so distributed as to win 435 electoral votes; Roosevelt's four million were so distributed (involving pluralities in only six states) as to win but 88; Taft's three and one-half millions curiously contained only two pluralities, *i.e.*, in Vermont and Utah, and won only eight electoral votes.

The fact that the entire electoral vote of a state falls to the candidates who poll a mere plurality of the popular vote leads the parties to concentrate their campaign efforts upon doubtful states, especially those which have a large electoral vote. New York is such a state; and the party managers are never likely to forget that in 1884 fewer than six hundred popular votes swung that state's thirty-six electoral votes to Grover Cleveland, and that it was these votes that made him a victor over the Republican candidate.[1] This intensification of party activity in pivotal states is disadvantageous in that it presents a special temptation to party workers to resort to bribery and other corrupt or dubious practices.

Counting the electoral vote

The constitution is curiously vague on the counting of the electoral vote; and out of that circumstance arose, in 1876, a very serious dispute. The Twelfth Amendment says that "the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." But who shall make the count? The constitution is silent. It might be inferred that the president of the Senate shall himself do it; and for more than a quarter of a century this was the practice. But suppose that conflicting returns are sent in from a state. Who shall decide which returns shall be received and

[1] J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 690-691 (Nov., 1917).

which rejected? Such a question actually arose in connection with the election of 1820, and Congress itself took jurisdiction.

The disputed election of 1876

On this basis, matters went along well enough until 1876. Then, however, a situation developed which startlingly revealed the weakness of existing arrangements. Tilden, the Democratic candidate, received 184 undisputed electoral votes; Hayes, the Republican candidate, received 164; from four states—Oregon, Florida, South Carolina, and Louisiana, with a total of twenty-one electoral votes—came conflicting returns. Tilden lacked but one vote of a majority; which meant, of course, that if any one of the contests was decided in his favor he would become president. The Senate was Republican, the House of Representatives was Democratic; and the rules required that no electoral vote whose validity was questioned should be counted unless the two houses, acting separately, should concur.[1] For obvious reasons, neither house desired this regulation to apply in the present case. Accordingly, it was repealed, and after much controversy an extra-legal body—an electoral commission consisting of five senators, five representatives, and five justices of the Supreme Court—was created to examine into and decide the several disputes. The commission included eight Republicans and seven Democrats, and, whether or not for this reason, every contest was decided in favor of Hayes, who was accordingly elected, without a vote to spare. The country was kept in suspense until within two days of the time for the new president to be inaugurated.

The Disputed Presidential Elections Act

When the excitement died down sober-minded men of both parties sought means of preventing a recurrence of the difficulty. Many intricate questions, however, were involved, and remedial legislation was delayed until 1887. The Disputed Presidential Elections Act of that year covers the ground in a reasonably comprehensive manner.[2] The procedure to be followed in counting the electoral vote is laid down step by step, and responsibility for settling disputes is thrown back upon the states. In view of the fact that the electors are state officers whose appointment is certified by the governor, and who meet and discharge their one duty within the state and under state authority, this disposition of the matter is entirely logical. Plural returns are not made absolutely impossible. But in cases of dispute tribunals appointed by and in

[1] This "twenty-second joint rule" dated from 1865.

[2] For a full account see J. H. Dougherty, *The Electoral System of the United States*, Chap. IX.

CHAP. XVIII

each state affected are to determine what electoral votes from the state are to be regarded as valid. Only in the event that no such tribunal is appointed or that two rival tribunals send in conflicting reports, will it fall to Congress to make a decision. If, under these circumstances, the houses differ, the state loses its vote altogether. Congress, however, retains power to reject the returns from a state, even though there is no dispute, if the two houses decide, first separately and afterwards jointly, that the vote or votes have not been "regularly given" by electors whose appointment is duly certified.

Shortcomings of the present law

It cannot be said that this settlement is ideal, or necessarily final. In the first place, its constitutionality has been questioned, on the ground that the constitution does not authorize Congress to exercise any control whatever over the electoral system.[1] In the second place, there are practical objections. If a dispute comes to Congress, and the two houses fail to concur, the vote of the state affected is lost altogether. It may, perhaps, be said that if a state cannot settle its own disputed elections it ought to be made to pay this penalty. Nevertheless such disfranchisement is inherently undesirable. But more serious is the possibility that a deadlock between the two houses of Congress may cause the title to the presidency and vice-presidency to be still in doubt when the fourth of March arrives. Fortunately, no occasion has arisen to test the existing law; otherwise, impetus would probably have been given to the oft-made proposal that the whole matter be regulated in a constitutional amendment which, among other things, should provide for some arbiter between the two houses in case of disagreement during an electoral count.

The electoral count as now carried out

Ordinarily, of course, the counting of the electoral votes is a mere formality; the country knows three months in advance what the result will be. On the second Wednesday in February—a month after the electors have met in the respective states—the members of the two houses gather in the hall of the House of Representatives, with the vice-president (or president *pro-tem.* of the Senate) in the chair. Two tellers have previously been appointed by each house. Starting with Alabama, and proceeding in strict alphabetical order, the presiding officer opens the certificates transmitted by the several electoral bodies, hands them to the tellers, who read them aloud and record the votes, and announces the out-

[1] W. W. Willoughby, *Constitutional Law of the United States*, II, 1132-1134.

come, which is duly entered, with a list of the votes, in the journals of the two houses. The person receiving the greatest number of votes for president, provided the number be a majority of the whole number of electors chosen, is declared elected; and similarly in the case of the vice-presidency. If there is no majority for president, the House of Representatives, voting by states, proceeds to elect. Each state, in such a contingency, has one vote, which is bestowed as the majority of the state's representatives determine. Until 1804, as we have seen, the choice of the House was made between the candidates who were tied, if there was a tie, or among the five highest on the list, if there was simply a lack of a majority. The Twelfth Amendment, however, provided for a choice among the three highest. A majority of all the states is necessary to elect. If no candidate for the vice-presidency obtains a majority of the electoral vote, the Senate—the members voting as individuals —choose from the highest two, and a simple majority elects.

Choice by the House of Representatives in 1825

Since 1801, the president has been chosen by the House only once, *i.e.*, in 1825. The electoral vote of that year stood: Jackson, 99; Adams, 84; Crawford, 41; Clay, 37. Clay was popular in the House and might have been elected if he could have been considered in the voting. As it was, he threw his strength to Adams, who was accordingly successful. Jackson had received the greatest number of votes in the electoral college, and his friends could never be convinced that he had not been grievously wronged in being passed over by the House. They charged Adams and Clay with entering into a "corrupt bargain," and launched a new campaign which easily landed their favorite in the White House in 1829. The whole proceeding, however, had been entirely constitutional, and talk of farther changing the electoral system died down without producing any result.[1]

Other proposed changes

The question of altering the method of electing the president and vice-president has, however, been discussed from time to time throughout our entire national history. The Twelfth Amendment remedied certain defects, and various statutes, *e.g.*, the Disputed Presidential Elections Act, dealt acceptably with others. But the chief anomaly remains, namely, the electoral college. This institution serves no purpose for which it was created; the people choose the president quite as truly as if they voted directly for him, and the electors merely go through the formality of translating the

[1] E. Stanwood, *History of the Presidency*, Chap. XI.

CHAP. XVIII

results into the form required by an archaic section of the constitution. Why not abolish the electoral college altogether and permit the people to choose the president in form as well as in fact?

The proposal is plausible, yet it raises questions of some difficulty. Should the people of the country as a whole, without reference to state or other interior lines, elect by a simple plurality or majority vote? Or should they vote by states, or by districts? The proposal to throw the entire country into one grand constituency and elect by a majority or plurality of the total popular vote has met with small favor.[1] If any change is ever made it is likely to preserve to the states, as such, some distinctive part in the electoral process. Two main possibilities suggest themselves: (1) direct popular vote for president and vice-president, election to be by, perhaps, a popular plurality in a majority of states; (2) direct popular vote, to be converted automatically, without the intermediary of the present electors, into an electoral vote, and election to be by a majority or plurality of this electoral vote. The first plan is objectionable because it would enable a number of the smaller states to swing the election by means of only a minority of the total popular vote; although it is not to be forgotten that we have "minority" presidents under the existing system.[2]

Desirability of a revival of election by districts

Furthermore, save for the elimination of the electoral college, the second plan offers no certain gain, except under one condition: if the electoral vote of the state were to be determined on a district basis rather than on a general ticket basis, a way would be opened for proportional representation, and it would not happen, as it does now, that a state's entire electoral vote would go to a given candidate notwithstanding that the popular vote was almost evenly divided. As is evidenced by the action of Michigan in 1891, supported by a decision of the Supreme Court,[3] there is no legal obstacle to the employment of the district plan today. The considerations of state pride and party advantage which originally caused the district system to be abandoned are, however, no less influential in our time than formerly. Only by a constitutional amendment could the plan be put into uniform use throughout the country; and, notwithstanding its manifest advantages over the present system, its advocates can hardly hope for its adoption. Its one obvious disadvantage would be the increased temptation to

[1] For objections to it see J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 703 (Nov., 1917).

[2] See p. 247.

[3] *Ibid.*

party forces within the several states to gerrymander the electoral districts.[1]

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[1] Without in any wise disturbing the present distribution of electoral power, the electoral college could be dropped out of the system by a simple constitutional amendment providing a way of translating a state's popular vote into an electoral vote without the intermediary of personal electors. But there is no sufficient impetus to lead to such action. See Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 704-707 (Nov., 1917).

CHAPTER XIX

THE PRESIDENT AS CHIEF EXECUTIVE

Parliamentary and presidential governments

The founders of our government broke with the trend of English political development by establishing an executive of the presidential, rather than the parliamentary, or "responsible," type. A parliamentary executive derives its authority from, and is directly responsible to, the legislature, and it holds office only so long as the legislature—at all events, the popular branch thereof—gives its support. The legislature is supreme; the executive is hardly more than an agent. The best known executive of this kind is the English cabinet, although the cabinets of France, Italy, Canada, and Australia are equally good examples. A presidential executive, on the other hand, is one which is chosen independently of the legislature, whose tenure is beyond the legislature's power to control, and which takes rank as a distinct branch of the government, co-ordinate with the legislative branch. This is the sort of executive that we have in the United States, both in the state governments and in the national government. It was adopted partly because American political experience in the period 1775-89 furnished no basis for a parliamentary system (even if the true character of that system had then been clearly perceived), but mainly because the makers of our constitutions were aiming at the preservation of liberty through a balance of power among separate and co-ordinate branches of government.[1]

Sources of the president's executive power

The president, therefore, as chief executive in the national government, occupies a detached position and has power and functions which in most cases are quite different from those of Congress and the courts. Some of his powers are expressly conferred in the constitution; for example, the appointment of officers, with the advice and consent of the Senate, and supreme command of the army and navy. Only a few brief clauses[2] are, however, devoted

[1] The parliamentary and presidential types are compared in W. H. Taft, *Our Chief Magistrate and his Powers*, Chap. I. Cf. W. F. Willoughby, *Government of Modern States*, 356-359; C. G. and B. M. Haines, *Principles and Problems of Government*, 273-279; and W. W. Willoughby and L. Rogers, *Introduction to the Problem of Government*, Chaps. XVII-XVIII.

[2] Art. II, §§ 2-3.

to this subject, and a large part of presidential power arises, rather, from implication and interpretation. Much can be inferred—to cite a single illustration—from the pledge required of the president at his inauguration to "preserve, protect, and defend the constitution." Still other powers spring from acts of Congress, passed in pursuance of its own direct or implied powers, and assigning to the president specific tasks and responsibilities. When, for example, Congress establishes a new executive department, a new diplomatic post, or a new commission, it automatically extends the president's power of appointment. When it passes a tariff act, such as that of 1909, authorizing the president to apply, at his discretion, a special scale of duties, it obviously puts into his hands an important power over foreign trade.

The question has often been discussed whether the president has inherent executive power. Does he have power, outside of the constitution and laws, simply because he is the chief executive? On one occasion the Supreme Court inclined to this view;[1] and ex-President Roosevelt expressed the belief that it is not only the president's right, but his duty, "to do anything that the needs of the nation demand unless such action is forbidden by the constitution or the laws." The basic fact of our government is, however, that it is a government of limited powers—of such powers only as are enumerated or implied in the constitution, which clearly means that no executive power, or power of any other sort, is inherent. "The true view of the executive functions is, as I conceive it," says ex-President Taft, "that the president can exercise no power which cannot be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must be either in the constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest."[2]

The question of inherent power

The broadening out of the president's powers by interpretation and statutory elaboration has, however, gone so far as to make the sum total of presidential authority immeasurably greater than the constitution's framers intended it to be. Much depends, of course, upon the personality of the president himself; under an Andrew

Magnitude of presidential power

[1] In the Neagle case (135 U. S., 1). See Taft, *Our Chief Magistrate and his Powers*, 88-91; W. W. Willoughby, *Constitutional Law of the United States*, II, 1152-1154.

[2] *Our Chief Magistrate and his Powers*, 139-140.

CHAP. XIX

Jackson or a Theodore Roosevelt there is naturally an augmentation of influence, if not an expansion of legal power. The character of the times also makes a difference; in the Civil War, and again in the World War, the presidency rose to heights of authority undreamed of in days of peace. Regardless, however, of both personalities and circumstances, the president has come to be—with the possible exception of the premier in cabinet-governed countries like England and France—the most powerful executive officer in the world. Among the three great branches into which our national government is divided, the executive is the only one whose development in the past hundred years has been at the expense of the other two.[1]

Principal executive powers:

Viewed comprehensively, the president's powers and functions fall into two main groups, according as they are executive or legislative; and to these may be added the extra-constitutional, but exceedingly important, function of party leadership. Executive powers fall, in turn, into five chief categories: appointment and removal of officers; direction of executive and administrative work; management of foreign relations; control of the military and naval establishments; and pardon and reprieve. These several forms of presidential executive activity will be briefly described in the order indicated.[2]

1. Appointment and removal

Outside of the members of Congress, only two officials in the national government are elected, namely, the president and the vice-president.[3] All others are appointed. The power to appoint is vested fundamentally in the president; and no monarch or minister in any foreign land has as much actual control over the filling of public offices as does he. His power in this direction is, none the less, subject to several important limitations. In the first place, by constitutional provision, he appoints, not independently, but "by and with the advice and consent of the Senate"—which means, concretely, the favorable action of a majority of the senators present when a given appointment comes up for consideration. As was explained by Hamilton in the "Federalist," this arrangement was adopted, not in order to relieve the president of responsibility for appointments, but to check any spirit of favoritism which he might display and to prevent the appointment of "unfit charac-

Restrictions:

[1] E. Stanwood, *History of the Presidency from 1897 to 1909*, 215.

[2] Legislative and party functions are considered in the succeeding chapter.

[3] Accuracy requires it to be noted, however, that each house of Congress chooses its own officers, except that the vice-president of the United States is *ex officio* president of the Senate.

ters from state prejudice, from family connection, from personal attachment, or from a view to popularity.'' [1]

(a) Advice and consent of the Senate

It long ago became customary for the Senate to endorse, as a matter of course, the president's selections for head positions in the executive departments. These appointees constitute his official body of advisers, *i.e.*, cabinet; besides, he, as the head of the executive branch, is directly responsible for their acts; and on both grounds it is only fair that in choosing them he shall have entire freedom. Rarely, too, are nominations to judgeships and diplomatic positions rejected. But elsewhere the power to confirm or reject is freely employed, and the president must be prepared, in case one nominee fails, to offer another or to see the office in question stand vacant. The number of senatorial rejections naturally varies according to circumstances. If the president and Senate are on good terms, and especially if the president's party is in control of the body, nominations are likely to be approved almost automatically. If, however, there are party differences or feuds of any kind, rejections or refusals to act will be relatively numerous.[2]

"Senatorial courtesy"

In any case, much deference is paid the long-established custom known as ''senatorial courtesy.'' Appointees have commonly been brought to the president's attention and their claims advocated, or they have been opposed as against other candidates, by one or both of the senators from their state, and under the rule of courtesy referred to the Senate will confirm or reject according to the wishes of the member or members immediately interested. If the president sends in the name of a resident of Cleveland to be collector of internal revenue in his district, the Senate will normally confirm if the nominee is satisfactory to the senator or senators from Ohio, and otherwise will reject—unless, of course, these senators are not of the party to which the president belongs. Senatorial action on proposed appointments often turns, therefore, on considerations other than the fitness of the nominee. Yet there are comparatively few rejections for which some good reason cannot be assigned. The president has every incentive to propose men who are not inherently objectionable and who, having the

[1] No. LXXVI (Lodge's ed., 474).

[2] During a recess of the Senate the president may make temporary appointments to positions requiring confirmation. But these lapse at the end of the Senate's next session unless confirmed; although in such a case there is nothing except considerations of expediency to prevent reappointment of the same man the moment the Senate adjourns.

CHAP. XIX

backing of the senators of their state—or of the leaders of his party in the state if the senators belong to a different party—are practically assured in advance of confirmation.

(b) Appointment of inferior officers by the courts and heads of departments

A second limitation upon the president's power of appointment arises from authority given Congress by the constitution to vest the appointment of such "inferior officers" as it thinks proper, not only in the president alone, but in the courts of law, or in the heads of departments.[1] The constitution nowhere defines the term "officer," nor does it say who are to be considered "inferior officers"; and no very clear delimitations have established themselves in practice. About all that can be said is that the constitution requires certain kinds of officers—ambassadors, other public ministers and consuls, and judges of the Supreme Court—to be appointed by the president and Senate, and that outside of this small group it is for Congress to say who are "inferior officers" and to provide for their appointment by any one of the three special agencies enumerated. This power has been exercised repeatedly: the president has been given sole control of certain appointments, *e.g.*, the librarian of Congress; the courts have been authorized to select their own clerks; and the heads of departments have been empowered to choose great numbers of subordinates. How far this disintegration of the appointing power has gone is indicated by the fact that in a total of six hundred thousand officers and employees in the national executive and administrative service only about fourteen thousand are nowadays put in their positions by action of the president and Senate. Postmasters in larger cities, collectors of customs and internal revenue, superintendents of the mints, members of such federal bodies as the Interstate Commerce Commission and the Federal Trade Commission, heads of departments and many bureau chiefs—all of these, with some other groups, are still "presidential" offices; and some of them are clearly not "inferior," in any ordinary sense of the word. None the less, the term is admittedly relative, and there is nothing except considerations of expediency to prevent Congress from transferring the appointment of any of the officers named—even the heads of departments—from the president and Senate to some other recognized appointing agency.

(c) Other limiting conditions

In making appointments the president is farther limited by certain practical conditions. The utter impossibility of personally knowing the qualifications of most of the candidates forces him to rely on other people for information and guidance; and in most

[1] Art. II, § 2, cl. 2.

appointments the initiative is taken by a senator or representative rather than by the president himself.[1] Appointments are often practically dictated, too, by the necessity of conciliating a wing of the party, or meeting a demand of a particular section of the country. And by no means the least important limiting condition is the difficulty of finding men who will accept arduous and responsible positions at the meager salaries which are sometimes provided.

Removals

The constitution makes all civil officers of the United States liable to removal by impeachment, but only upon conviction of treason, bribery, or other high crimes and misdemeanors. Obviously, there must be removals for incompetency, neglect, and other reasons which have no relation to the specified grounds for impeachment, and the question of how such removals should be made forced itself upon the attention of Congress almost immediately after the new government under the constitution was set up. Two opposing views appeared. One was that, in the absence of any provision in the constitution, the power to remove should be implied from the power to appoint and should be exercised by the same authorities that made appointments, *i.e.*, the president and Senate. Alexander Hamilton was strongly of this opinion. The other view was that if the president was required to obtain the consent of the Senate to removals, the resulting refusals and delays would seriously impair the efficiency of the service, and that, therefore, the president ought to be in a position to remove officials by his own independent action. Madison argued convincingly for this view, and it finally prevailed.

In 1867 Congress, out of hostility to President Johnson, passed over his veto a Tenure of Office Act which provided that, while the president might suspend a civil officer when the Senate was not in session and accordingly could not act on the case, he should finally remove no such officer except with the consent of that body. This measure, however, was partly repealed in 1869, and was rescinded altogether in 1887; and it is now generally conceded that Johnson was correct in his view that it was unconstitutional.[2] The president cannot remove judges, who hold office during good behavior and are removable only by impeachment; and he may remove officials who secure appointment under the merit system only "for such

[1] W. H. Taft, *Four Aspects of Civic Duty*, 98.

[2] The act never came before the courts in such a manner as to lead to a decision upon its validity. But the Supreme Court has strongly intimated that it was unconstitutional.

CHAP. XIX

causes as will promote the efficiency of the service."[1] But otherwise he can remove any civil officer of the United States at any time, for any reason, and without giving any explanation; and this is no less true of officers appointed for a term of years than of those whose tenure is indefinite.[2]

2. Direction and ordinance-making

To the president's power to appoint and remove officials is added the still more important power to direct them in the performance of their duties. As exercised today, this power is the product of long and somewhat hazardous development. The idea of the makers of our national governmental system was that the control of executive and administrative work should be divided between the president and Congress; and when the first executive departments were established it was specified that the former should have power to direct two of them, *i.e.*, State and War, but that the head of the third, *i.e.*, the Treasury, should report directly to Congress. The earlier presidents used their directing power sparingly, and the courts viewed it as practically limited to the fields in which it was specifically conferred.

Division of control over administration between the president and Congress

There is no denying that Congress exercises much control over the executive authorities today, and especially over the subordinate administrative system.[3] It is Congress that creates the executive departments and their more important subdivisions and determines what their functions shall be. It is Congress that says, in many situations, what shall be done and—in so far as it likes—how it shall be done. Congress alone can provide the requisite funds, and it can investigate, criticise, and suspend or permanently stop many, if not most, kinds of administrative activity, regardless of the wishes of the president and his advisers. Nevertheless, the president has gradually acquired a very substantial power of direction. Congress itself has helped to build up this power by passing large numbers of acts creating new governmental machinery and conferring on the president the direction of it.

Basis and extent of the president's power of direction

But the power is one which must have developed greatly in any case. To begin with, the power to remove involves the power to direct. This was clearly illustrated when President Jackson ordered the deposits of government funds in the United States Bank

[1] See p. 304. This restricting clause is so elastic that, in practice, it is possible for the president to bring about almost any removal of a merit appointee that he desires.

[2] This was the ruling of the Supreme Court in the case of Parsons *v.* United States, decided in 1890. 167 U. S., 324.

[3] See pp. 396-397.

to be withdrawn, and dispensed with two secretaries of the treasury before obtaining one who would give the necessary order.[1] Armed with the power of removal, he could reiterate his command indefinitely until some one was found to carry it out. In the second place, however, the power of direction has a clear constitutional basis. The constitution makes it the duty of the president to "take care that the laws be faithfully executed,"[2] and requires him, at his inauguration, to take oath that he will "faithfully execute" the office of president and preserve, protect, and defend the constitution. His foremost duty, indeed, is the execution of the laws—not only the acts of Congress, but treaties, decisions of the federal courts, and all obligations which can be inferred from the constitution; and to this end he must be regarded as endowed with power to direct his subordinates in the executive service, even as he is authorized to use the armed forces if such a course becomes necessary. Acts which are required by law of heads of departments or other officers, *i.e.*, acts which are "ministerial" rather than political, are, indeed, theoretically beyond the president's power to control. In case of neglect, there are recognized judicial processes to compel their performance. Nevertheless, even here the president may assert himself; he may threaten to remove an officer for performing an act required of him by Congress, thereby forcing upon him, at all events, the disagreeable choice between a legal prosecution and the loss of his position.

The ordinance power

Closely related to the power of direction is the ordinance power. The nature and scope of the government's various activities are defined in acts of Congress, but the details of organization, the forms of procedure, and, in general, the *minutiæ* of administration, are left to be determined by supplementary rules and regulations. Thus, an immigration law may provide in a general way that paupers and criminals shall not be admitted to the country; but it will remain for the branch of the government charged with executing the law to prescribe precisely how aliens shall be inspected, what steps shall be taken if they appeal from the decision of the inspectors, and what arrangements shall be made for their detention if they are finally refused admission. Most of this subordinate legislation emanates from the heads of departments or their inferiors. But a considerable amount comes from the president,

[1] W. MacDonald, *Jacksonian Democracy*, Chap. XIII.
[2] Art. II, § 3.

CHAP. XIX

who, in addition, is, of course, ultimately responsible for all ordinances issued in the departments.[1] The president himself promulgates the Consular Regulations, the Civil Service Rules, and the Army and Navy Regulations, together with rules for the patent office and the customs and internal revenue services. In some cases he acts upon express statutory authority; in others his authority is implied from the nature or tone of the law to be executed; in still others he proceeds under sole warrant of the constitution. The Army and Navy Regulations, for example, were long promulgated by virtue of the president's constitutional status as commander-in-chief, although nowadays they have also a statutory basis. The ordinance power is not as extensive in the United States as in Great Britain and other European countries. But it tends to expand as governmental functions become more numerous and complex; and under the stress of the World War it attained truly remarkable proportions.[2]

3. Conduct of foreign relations:

The next two presidential powers of which we shall speak relate to activities over which the national government has exclusive jurisdiction and in which the president himself has easily the most prominent part. One is the conduct of foreign relations; the other is the carrying on of war. The president's rôle in the management of our relations with foreign states presents several phases. In the first place, he is the official medium of intercourse between our government and all foreign governments. He speaks for the country on ceremonial occasions and receives distinguished visitors to our

(a) Maintenance of intercourse

shores; subject to the Senate's power of confirmation, he appoints all of our ambassadors and ministers to other countries, and all consuls stationed therein;[3] on his sole responsibility, he receives

[1] See p. 295. The extent and importance of this subordinate legislation are clearly brought out in J. A. Fairlie, "Administrative Legislation," *Mich. Law Rev.*, XVIII, 181-200 (Jan., 1920).

[2] For example, the Food and Fuel Control Act of 1917 authorized the president, among other things, to "fix the price of coal and coke and to establish rules for the regulation of their production, distribution, and storage"; and a measure in 1918, known as the Overman Act, went farther by authorizing him "to make such redistribution of functions among executive agencies as he may deem necessary . . . in such manner as in his judgment shall seem best fitted to carry out the purposes of this act." These were, of course, war measures whose operation ceased after hostilities were ended. W. F. Willoughby, *Government Organization in War Time and After*, Chap. I. On the ordinance power see also p. 295 below.

[3] Indeed, the president can employ special agents abroad without procuring senatorial consent at all. These agents are not officers of the United States, and they can be paid only out of the president's contingent fund, unless Congress makes special appropriations for them. But their services may be very important, as, for example, were those of Col. E. M. House as special emissary

foreign ambassadors and other public ministers, and also, if necessary, dismisses them; through the State Department he carries on correspondence abroad, declaring policy, pressing claims, offering settlements, replying to all manner of inquiries and proposals.

(b) Recognition

Out of this function of representing the nation in its dealings abroad grows a second very important power, *i.e.*, recognition. This means the power of determining what the official American attitude shall be toward some unsettled or altered political situation in other lands. An insurrection or civil war may have arisen, and the president may recognize the insurgency, or even the belligerency, of the insurrectionists, thereby according them (so far as the United States is concerned) certain rights which they would not have as mere rebels.[1] An example is President Cleveland's recognition of a state of insurgency in Cuba in 1895. But he may go farther: by proclamation, or by sending or receiving a diplomatic representative, he may recognize the independence of an insurrectionary state, even at the risk of bringing on a war between the United States and the state which has been dismembered. Thus President Monroe recognized several of the revolutionary Latin American republics;[2] thus President Roosevelt, by receiving the emissary of the embryo republic of Panama in 1903, recognized Panama as an independent state and paved the way for the agreement under which the Panama Canal was built;[3] thus also were Czechoslovakia and other new European states recognized in 1918 and 1919. Again, the president may determine which of two or more contending governments in a country is the lawful one. In case there is a dispute, he must, indeed, decide to what government he will accredit a representative. He may, of course, withhold recognition altogether, and may thereby deeply influence the course of events in the country concerned. The downfall of Huerta in Mexico in 1914 was directly caused by President Wilson's refusal to recognize him as the *de facto* chief executive. The constitution says nothing about recognition, and at various times it has been argued that Congress possesses the power concurrently with the president. International usage, however, indicates that it

of President Wilson in Europe during the World War. See H. M. Wriston, "Presidential Special Agents in Diplomacy," *Amer. Polit. Sci. Rev.*, X, 481-499 (Aug., 1916).

[1] A. S. Hershey, *Essentials of International Public Law*, 117-123.

[2] Congress appropriated one hundred thousand dollars for diplomatic posts in Latin America, but admitted the president's right to determine what countries should be thus recognized. J. Q. Adams, *Memoirs*, IV, 205-206.

[3] *Foreign Relations of the United States* (1903), 245.

CHAP. XIX

is strictly an executive function; as such, it is easily inferable from the power to appoint and receive envoys; and precedent, backed by judicial opinion, places it clearly in the president's hands, subject only to the power of the Senate to confirm diplomatic appointments.[1]

(c) Protection of citizens abroad

"Under our system of government," the courts have declared, "the citizen abroad is as much entitled to protection as the citizen at home";[2] and it falls to the president, as chief executive and director of our foreign relations, to see that such protection is duly given. If an American sojourning in a foreign land or traveling on the high seas is maltreated and cannot obtain justice, the president, acting through a diplomatic representative, or even directly, may make demands in his behalf, and may go to any lengths short of a declaration of war to obtain redress for him. Similarly, it is the president's duty to accord protection to foreigners temporarily domiciled in the United States. This does not necessarily mean that he must do more in their behalf than execute the laws of Congress touching their rights—which, of course, he is bound to do in any case. But he may specially request the authorities of a state to be regardful of alien rights; he may instruct a district attorney to give legal aid; and in time of war he may enlighten both aliens and citizens by a proclamation of neutrality calling attention to rules of international law and to statutes forbidding various unneutral acts.

(d) Treaty-making

The most important of the president's powers in relation to foreign affairs have yet to be considered, namely, the making of treaties and the shaping of foreign policy. Until the work of the convention of 1787 was far advanced, treaty-making was intended to be vested solely in the Senate. Eventually, however, the president was admitted to a leading part, for the reason—so Jay tells us in the "Federalist"—that "perfect secrecy and immediate dispatch are sometimes requisite."[3] Accordingly the provision is that the president shall make treaties, "by and with the advice and consent of the Senate . . . provided two-thirds of the senators present concur."

[1] E. S. Corwin, *The President's Control of Foreign Relations*, 71-83; J. M. Mathews, *The Conduct of American Foreign Relations*, Chap. VII; W. L. Penfield, "The Recognition of a New State—Is it an Executive Function?" *Amer. Law Rev.*, XXXII, 390-408 (May-June, 1898); C. A. Berdahl, "The Power of Recognition," *Amer. Jour. Internat. Law*, XIV, 519-539 (Oct., 1920); J. Goebel, "The Recognition Policy of the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LXVI, No. 1 (1915).

[2] Nelson J. Durand *v.* Hollins, Fed. Cas. No. 4186 (1860).

[3] No. LXIV (Lodge's ed., 403). Cf. No. LXXV.

The initiative lies entirely with the president. Either house of Congress, or the two houses concurrently, may by means of a resolution advise that a certain treaty be negotiated. But unless the president chooses to set the necessary machinery in motion nothing can be done. Conversely, he can start a negotiation regardless of the feeling in either branch of Congress concerning it, or even without any knowledge on the part of Congress; and he need make no disclosures regarding it until he is ready to do so. He may work through the regular diplomatic representative accredited to the foreign government concerned, or he may appoint a special plenipotentiary or commission; or again he may cause the negotiation to be carried on at Washington through the Secretary of State. When the treaty is completed, he, furthermore, has the full option of submitting it to the Senate, returning it to the negotiators for revision, or dropping it and ordering the negotiations discontinued. He may hold back the instrument because he considers it unsatisfactory, or because he recognizes that reference to the Senate would be useless. Jefferson, in 1806, sent back to Monroe and Pinkney a treaty which they had concluded with Great Britain, because he saw that it entirely failed to settle the real issues between the two countries.[1]

Washington and Jackson consulted the Senate in advance about the terms of Indian treaties, and Polk, in 1846, similarly sought advice on a proposed convention with Great Britain for the settlement of the Oregon boundary. This practice, however, never established itself;[2] and although the president nowadays usually finds it expedient to consult with the members of the Senate committee on foreign relations when a negotiation is in progress, or even to appoint senators to be members of the negotiating commissions,[3] the chamber normally is given no opportunity to take action on a proposed treaty until the completed instrument is transmitted to it.

"A treaty entering the Senate," wrote John Hay after six years

[1] E. Channing, *The Jeffersonian System*, 203-208.

[2] There are not more than a dozen instances of the sort since 1830. See J. W. Foster, *The Practice of Diplomacy*, 269-273.

[3] Three of the five commissioners appointed by President McKinley to negotiate a treaty of peace with Spain in 1898 were senators, one of them being chairman of the foreign relations committee; and two of the four commissioners who signed, on behalf of the United States, the treaty concluded with Great Britain, France, and Japan at the Washington conference on the limitation of armaments in 1921-22 were senators, one of them again being the chairman of the foreign relations committee. President Wilson was much criticized because he did not include one or two senators in the commission which represented the United States in negotiating the treaty of Versailles in 1919.

CHAP. XIX

The Senate's part in treaty-making

of experience as Secretary of State, "is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive."[1] This statement is much too strong, as is evidenced by the fact that in over a hundred years the Senate entirely withheld its consent from only seventeen in a total of about six hundred and fifty negotiated treaties.[2] Every proposed treaty, however, has to run the gauntlet of senatorial scrutiny, and some treaties emerge triumphant only after a great parliamentary fight, in which all possible favoring influence is brought to bear from the White House. Ordinarily, treaties are considered in secret executive session, although some, *e.g.*, the Taft arbitration treaties of 1912, have been debated with open doors. In seventy or eighty instances, beginning with the Jay treaty in 1794, the Senate's consent to ratification has been qualified by reservations, amendments, and interpretations. These are tantamount to a change of the treaty, and if either the president or the foreign government is unwilling to accept such a modification the treaty fails. A number of arbitration treaties were killed in this way in 1904, and again in 1911. At any time while a treaty is pending in the Senate the president can recall it, whether because circumstances have so changed that he no longer favors it or because he perceives that it is doomed to failure. Even after the Senate has given its consent a treaty may be held up. It remains for the president to ratify it and, upon being apprised of ratification by the other government, to promulgate it; and he may refuse to take these final necessary steps, although naturally he will do so only under very unusual circumstances.[3]

Abrogation of treaties

Once promulgated, a treaty becomes part of the law of the land, enforceable like any other portion of that law. Not all treaties, however, are, or are intended to be, permanent; and, while they may be abrogated, wholly or in part, by acts of Congress, it commonly falls to the president to take the necessary steps to bring about their termination. Normally, this will mean the negotiation of a substitute treaty. But it may take the form of a simple denunciation of an existing treaty by the president and Senate, or by the

[1] W. R. Thayer, *Life and Letters of John Hay*, II, 393.

[2] S. B. Crandall, *Treaties, their Making and Enforcement*, 82.

[3] Some treaties require appropriations of money for their enforcement, and the House of Representatives has accordingly at times set up a claim to participation in the treaty-making power. In his message on the Jay treaty in 1796 Washington, however, urged that after a treaty has been duly ratified Congress is morally obligated to take whatever action is necessary for its enforcement; and this view has commonly prevailed. J. M. Mathews, *Conduct of American Foreign Relations*, 201-206.

president alone. President Taft, in 1911, terminated a long-standing treaty with Russia by independent denunciation.

Executive agreements

Treaties can become operative only with the advice and consent of the Senate. But not every understanding entered into with a foreign government takes the form of a treaty. Many are, instead, simple executive agreements. In some cases, *e.g.*, postal conventions, these agreements rest upon a statutory basis. But the majority of them are concluded by the president, directly or through agents, on his sole authority; and the limits to which he can go are determined by nothing more tangible than precedent. Many agreements deal with minor matters which, by general admission, do not call for a treaty; for example, pecuniary claims of American citizens against foreign governments. But others relate to affairs of prime importance. Thus the arrangement with Great Britain in 1817 for the limitation of naval forces on the Great Lakes was originally an executive agreement, although it was later converted into a treaty. The Boxer indemnity agreement of 1900, the Lansing-Ishii agreement of 1917, and the preliminaries of peace and the armistice with Germany in 1918 are other illustrations.

Indeed, an executive agreement may become frankly a means of evading—temporarily, at all events—the necessity of securing a treaty. In 1905 President Roosevelt prepared a treaty with Santo Domingo stipulating that the United States should guarantee the integrity of that republic and should take over the administration of the customs with a view to settling foreign claims and warding off European intervention. The Senate refused to consent to the treaty; whereupon the president entered into a *modus vivendi* with the Santo Domingan government on exactly the lines desired, and for two years the protectorate was maintained on this sole basis.[1] In 1907 a treaty regularizing the arrangement was at last carried through. President Taft, in 1911, entered into a similar agreement with Nicaragua, which was superseded by a treaty only in 1916. So far as content goes, there is therefore no clear line of demarcation between executive agreements and treaties. There is a presumption that executive agreements which deal with large matters are preliminary to treaties. But this is not necessarily true; and, outside of the constitutional restriction that they cannot provide for outlays of money not authorized by Congress and the practical restriction arising from disinclination to incur senatorial or popu-

[1] *Foreign Relations of U. S.* (1905), 334-343; Roosevelt, *Autobiography*, 551-552.

CHAP. XIX

lar displeasure, there is really no limit to the extent to which the agreement-making power may be stretched.

(e) Determination of foreign policy

More than any one else, the president determines the nation's foreign policy. When a foreign complication arises, or a new international problem presents itself, he has the first opportunity to say what the attitude of this country will be; and by the stand which he takes he can so put the country on record as to make it next to impossible for Congress, or even a succeeding president, to assume a different position. Washington, by his proclamation of neutrality in 1793, practically determined once for all that the United States should hold aloof from the great struggle that had broken out between Great Britain and France. Monroe, in 1823, promulgated a set of principles concerning foreign political activities in the western hemisphere which, under the name of the Monroe Doctrine, broadened out into perhaps the most continuous and important of all our foreign policies. McKinley, through his Secretary of State, John Hay, irrevocably committed the country, in 1900, to the "open door" in China. Roosevelt, Taft, and Wilson brought successive Caribbean republics under United States supervision and, for better or for worse, left us a fairly definite policy of maintaining Latin American protectorates. In all such matters the president must sooner or later have the backing of Congress, and of public opinion; and it must be recalled that not only was Adams balked in his Pan-American policy, Pierce in his Cuban policy, Grant in his San Domingan policy, and Cleveland in his Hawaiian policy, but the war of 1812 and the intervention in Cuba in 1898 were forced upon reluctant presidents by zealous congresses. None the less, speaking broadly, executive leadership has made the story of our foreign relations what it is. The president has unrestricted initiative; he can go far by his own independent authority; and it is usually found impossible to retrace the steps that he has taken. As will presently appear, he may even lead the country into war; for although he cannot declare war, he can adopt an attitude or create a situation that will make war unavoidable.

4. War powers

This raises the general question of the president's war powers. By the terms of the constitution, he is commander-in-chief of the army and navy, and also of the militia of the several states when it is called into federal service. This alone would give him great military authority. But, in addition, he is required to see that the laws are faithfully executed, which may at any time entail the use of force; and it falls to him to act when it becomes neces-

sary for the United States to discharge its constitutional obligation to protect the states against invasion or (on call) against domestic violence. Congress, it is true, shares generously in the war power. It creates the army and navy, fixes their size, determines the conditions of service, regulates the pay of officers and men, and votes all appropriations for equipment and maintenance. It makes rules for the regulation of both land and naval forces; and it alone can declare war. The president's actual control is, however, not seriously impaired by this division of authority. He appoints all the regular and reserve officers of the army and navy.[1] He supplements the general rules of Congress with detailed regulations. He has full power of direction over the war and navy departments, in which the money voted by Congress is spent. Limited only by the funds at his disposal, he can send both land and naval forces anywhere that he chooses, in this country or abroad, in time of war or in time of peace. He can wield as much authority as he likes in the planning and execution of campaigns, and there is nothing to prevent him from taking the field in person if he desires to do so. He can establish military governments in conquered territory and directly, or through his appointed agents, exercise all executive power there, and all legislative power as well, until Congress makes other arrangements.[2] In short, Congress provides the money and the men; the president uses them, largely at his own discretion.

Division of control with Congress

Congress alone can declare war. But it is to be observed, first, that in the case of a civil war no declaration is necessary, and second, that, as has been said, the president may, by his own acts, make war inevitable. As commander-in-chief, President Polk, in 1846, ordered American troops to advance into territory which was in dispute with Mexico. The Mexican authorities had made it plain that such a step would be regarded as an act of war, and the soldiers were promptly fired upon. Polk then said that war existed by act of Mexico, and Congress proceeded to a formal declaration. President McKinley ordered the battleship *Maine* to Havana harbor in 1898, notwithstanding that the Spaniards were certain to regard the act as distinctly unfriendly. The vessel was blown up, and the Spanish-American war ensued. War with Great Britain was

The president and the beginning of war

[1] The officers of the militia, except when it is in the service of the United States, are appointed as the several states direct.

[2] D. Y. Thomas, "History of Military Government in the Newly Acquired Territory of the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XX, No. 2 (1904).

narrowly averted in 1895 when President Cleveland, in a message to Congress, took a bold stand against the course of that power in the Venezuelan controversy. Had Colombia been a stronger state, war might well have been brought upon the United States by President Roosevelt's recognition of the republic of Panama in 1903. There will always be difference of opinion as to whether we were or were not at war with Mexico on the occasion of Admiral Mayo's capture of Vera Cruz by sole order of President Wilson in 1913.[1]

Military powers in peace-time and in war-time

The president is commander-in-chief in time of peace no less than in time of war.[2] The constitution does not define his functions in this capacity under either condition, nor has any court attempted to do so; but usage has made them fairly clear. In peace times he appoints officers, makes regulations, and, in general, sees that the armed forces are so maintained as to be in readiness for quick and effective use. There is comparatively little to be done outside of ordinary administration. But in war times the situation is wholly different; the power of command then expands almost without limit, finding applications that would never be tolerated, or even thought of, save in a national emergency. The object in war is to break down the enemy's power of resistance as speedily as possible, and it becomes the president's supreme duty to take such measures as will accomplish this, and such others as will, meanwhile, conserve and enhance our own capacity for resistance. He may not, of course, violate the constitution or the laws; and, to a degree, he must work in cooperation with Congress. But, outside of these limitations, he and his advisers, civil and military, have a free hand.

Naturally, the president's war powers rose to their greatest heights during the Civil War and the more recent World War. Lincoln, in addition to the active direction of operations on land and sea, authorized searches and arrests without warrants, caused newspapers to be suppressed, declared martial law in regions where the regular courts were open, suspended the writ of habeas corpus, and in other ways sought to suppress opposition to the policies of the government from persons in the North who sympathized with the southern states. With a view, too, to lessening the South's

[1] F. A. Ogg, *National Progress*, 293-296. See S. E. Baldwin, "The Share of the President of the United States in a Declaration of War," *Amer. Jour. Internat. Law*, XII, 1-14 (Jan., 1918).

[2] This has been questioned in Congress, but the contrary view has never established itself. See Reinsch, *Readings on American Federal Government*, 22-32.

power of resistance, he issued the famous proclamation of 1863 liberating the slaves in the enemy states. Most of his acts were subsequently sanctioned by Congress and the courts, but they were originally performed on his sole responsibility; and a few were later pronounced unconstitutional.[1] During the World War, President Wilson, also, wielded tremendous power. Far more than Lincoln, he obtained from Congress, in advance, grants of authority which he considered necessary for the successful prosecution of the war. The powers with which he was thus endowed, however—*e.g.*, in the draft act of 1917, the food and fuel conservation act of the same year, and the Overman act of 1918—transcended, in numerous directions, those which Lincoln wielded.

Forcible execution of the laws

The constitution requires the president to see that the laws are faithfully executed; his oath of office pledges him to protect and defend the constitution; and the general nature of his position makes it his duty to guard all federal instrumentalities and property. To these various ends, he may, if necessary, make full use of the army and navy, and likewise of the militia of the states when called, according to act of Congress, into federal service. Congress has passed numerous measures authorizing the use of both the national and state forces for these purposes.[2] But—so far as the army and navy, at all events, are concerned—the president would have the power in any case. "The entire strength of the nation," the Supreme Court has said, "may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care. . . . If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."[3]

Suppression of domestic disorder

The constitution also stipulates that the United States shall guarantee to every state a republican form of government and shall protect the states against both invasion and domestic violence. If the republican form of government in a state is threatened or an invasion is undertaken, the president acts without awaiting a re-

[1] For example, the setting up of military courts for the trial of civilians in regions where the civil courts were open. *Ex parte* Milligan, 4 Wallace, 2 (1866).

[2] The series began with (1) the militia act of 1795 which authorized the president to call forth the militia whenever the execution of the federal laws was obstructed by combinations too powerful to be suppressed through the ordinary course of judicial proceedings, and (2) an act of 1807 which authorized the use of the army and navy under similar circumstances.

[3] *In re* Debs, 158 U. S., 564 (1895).

quest from the state authorities. If, however, the situation involves simply domestic disorder, he cannot act until he is asked to do so, unless the execution of national law or the safety of national property is imperiled; in this contingency he may intervene independently, as did President Cleveland when, in 1894, the carrying of the mails and the flow of interstate commerce were frustrated by a great railway strike at Chicago.[1] A request for national assistance in repressing domestic violence is made by the legislature of the state if it is in session, otherwise by the governor. The president is not bound to comply; indeed he is not likely to do so unless, after investigation, he feels that the authorities of the state have reached the limit of their capacity to handle the situation. When first asked to aid West Virginia in curbing disorders produced in that state by protracted strikes of bituminous coal miners in 1921 President Harding demurred, although subsequent developments led him to take the desired action.

5. Pardon and reprieve

Finally may be mentioned the president's power, as chief executive, to grant pardons and reprieves. The Supreme Court has said that the effect of a full pardon is to make the offender, in the eye of the law, "as innocent as if he had never committed the offense"; [2] a reprieve is, of course, only a suspension of the execution of a sentence. In wielding this power the president acts under two express constitutional limitations: he cannot pardon a person who has been impeached and thus restore him to office; and he can grant a pardon only where the offense has been against the authority of the United States and not that of a state. Furthermore, by judicial construction he cannot pardon a person sentenced to imprisonment for contempt by a federal court.[3] But outside of these restrictions the pardoning power is very ample. It may, indeed, be used in behalf of a stipulated class of persons, rather than individuals specifically named, and thus give rise to what is called an amnesty. And although Congress can itself pass acts of amnesty,[4] that body

[1] Governor Altgeld protested against the use of national troops in the state until he or the legislature requested it. But the president stood firmly on his right and duty to execute the national laws with all the forces at his command, and his position was sustained by the unanimous judgment of the Supreme Court in the Debs case previously cited. See Cleveland's own account of the affair in his *Presidential Problems* (New York, 1904), Chap. II.

[2] It does not have the effect, however, of restoring property that has been forfeited or office that has been vacated. W. W. Willoughby, *Constitutional Law of the United States*, II, 1171.

[3] *Ibid.*, II, 1270. Cf. Taft, *Our Chief Magistrate and his Powers*, 120-121.

[4] Brown *v.* Walker, 161 U. S., 591 (1896).

cannot in any way, by legislation, curtail the president's right to grant pardons at his own discretion. Pardons, furthermore, may be full and unconditional, or they may be restricted in any manner that the president chooses.[1] Few of his powers bring a president more perplexities than does this one. He is provided by the Department of Justice with full information, and with opinions, on each case that comes up. But he alone makes the decision, and in doing it he must be prepared, in the interest of the public well-being, to withstand touching appeals and powerful influences.[2]

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[1] A person serving a sentence in a federal prison may also be paroled, without pardon; or his sentence may be commuted.

[2] Taft, *Our Chief Magistrate and his Powers*, 118-124. A recent notable illustration is the pardon of Eugene V. Debs by President Harding in December, 1921.

CHAPTER XX

THE PRESIDENT AND CONGRESS

The president is more than a chief executive

As chief executive, the president is an imposing and powerful figure. His influence over public affairs extends, however, far beyond his functions in this capacity; he is, to all intents and purposes, a law-maker, in addition to being usually the principal leader of his party. The high esteem in which the makers of the constitution held the doctrine of separation of powers did not prevent them from giving the head of the executive branch an important share in the work of law-making; and the original grant has been so amplified by usage that the nature and amount of the yearly output of national legislation are nowadays determined hardly less by the president than by Congress itself.

Power to convene Congress in special session

Three things pertaining to law-making the president is expressly authorized to do: (1) to convene and adjourn Congress; (2) to give Congress information and recommend measures for its consideration; and (3) to approve or veto bills. By constitutional provision a congress lasts two years and has one regular session each year, beginning on the first Monday in December. Hence there is no power of dissolution, such as exists in cabinet-governed countries, and the president has no control over the date and length of regular sessions, except that he may adjourn the houses if they find themselves unable to agree on a time of adjournment. The president may, however, at his discretion, convene the houses, or either of them, in special session; and this is not infrequently done, particularly when a new president has taken office and it is not desired to wait nine months before getting the Administration's legislative program under way. Each of the last three presidents has called a special session, at which important legislation was enacted, very soon after his inauguration.

Messages to Congress

The requirement that the president shall give Congress information on "the state of the Union" and recommend to its consideration "such measures as he shall judge necessary and expedient"[1] is entirely logical. His duties enable him to know

[1] Art. II, § 3.

many things about both foreign and domestic affairs that are beyond the ken of the members of the legislative branch; he can point out defects and needs, and can suggest remedies in line with actual executive experience; and he is no less under obligation than is Congress itself to put information and ideas at the country's service. How frequently he shall communicate with Congress, at what times, at what length, and in what way, the constitution does not specify; accordingly each president exercises full discretion in these matters. It long ago became customary, however, to transmit at the opening of each congressional session a comprehensive message summarizing the state of public affairs, calling attention to matters requiring early consideration, and perhaps indicating specific measures which, in the president's judgment, ought to be adopted. In addition, shorter special messages, usually dealing with a single subject, are sent in as the occasion demands or the president desires. Washington and John Adams appeared in person before the two houses in joint session and delivered their messages orally. Jefferson, however, sent in his messages in writing; and this practice prevailed until 1913, when the oral form was revived by President Wilson. The oral message has some distinct advantages: it is likely to be more concise than the written message, which, in point of fact, has often been diffuse and uninteresting; it gives the president a chance to make his personality felt; and, even though but momentarily, it brings the executive and legislative branches into a closeness of touch which is too often lacking under a presidential form of government. On the other hand, the oral message may solidify opposition and precipitate conflicts which a written communication would hardly arouse.

The effects of messages

How influential presidential messages are is a matter upon which it is difficult to generalize. Congress is under no obligation beyond giving a respectful hearing; it may take action directly opposed to the recommendations made, or it may refuse to act at all. Much depends, of course, upon whether the president's party is in control of both houses. But even if it is, there is no guarantee that his advice will be followed. Sometimes, it may be added, a message is really aimed at the country, or even at the world at large, rather than at Congress. The president may desire to stir public opinion on a given subject, with or without a view to legislation, and may use the congressional message as a means to that end. President Roosevelt did this repeatedly. Or he may want to make

CHAP. XX

his attitude known to a foreign state or group of states without incurring the embarrassments that might flow from resort to the customary diplomatic channels; as, for example, when Monroe, in 1823, served notice upon Europe of the principles which we have since known as the Monroe Doctrine, or when Cleveland, in 1895, told Great Britain, through the indirect and unexceptionable means of a message to Congress, that war would follow any attempt by that power to extend its sovereignty over territory which an investigating commission, then about to be set up, should award to Venezuela.[1] In numerous oral messages during the World War President Wilson summed up and unified the thought of the country on submarine warfare and other subjects; in the message of January 2, 1918, he set forth, practically in behalf of the Allied and Associated Powers, and in the form of the famous "fourteen points," the basis on which peace could presumably be restored.

The veto power

Another way in which the president wields influence—in this case, positive control—over legislation is the exercise of the veto power. We have seen that the absolute veto as used by the colonial governors was exceedingly unpopular, and that most of the Revolutionary constitutions gave the new state governors no veto power whatever. The makers of the national constitution had in mind, however, a balanced government in which each branch should be prevented from intruding upon the rights or absorbing the power of the other branches; and the most practicable means of defense for the executive against encroachments by the legislature, *i.e.*, Congress, seemed to be the power of veto. Furthermore, as Hamilton urged in the "Federalist," the veto would "furnish an additional security against the enaction of improper laws".[2] Accordingly, the constitution requires that every bill which shall have passed the two houses of Congress shall, before it becomes a law, be presented to the president, who, if he approves, shall sign it, and if he disapproves, shall return it, with his objections, to the house in which it originated, and it shall then become law only if both houses, by a two-thirds majority, again pass it.[3] The veto is not, therefore, absolute. It makes necessary a reconsideration of the bill; it gives the president an opportunity to present a formal argument against the measure; and it makes a second

[1] D. R. Dewey, *National Problems* (New York, 1907), 307-308.
[2] No. LXXIII (Lodge's ed., 458).
[3] Art. I, § 7.

passage more difficult than the first. But it does not kill a bill which has sufficiently extensive legislative support.

Courses open to the president when a bill is presented to him

When a bill is passed by the two houses and presented to the president, any one of four things may happen. The president may promptly sign it, whereupon it becomes law. Or, he may hold it without taking any action, in which case it becomes law at the expiration of ten days (Sundays excepted), without his signature, provided Congress is still in session. He may take this course because he disapproves of the measure and is unwilling to put his name to it, although recognizing that a veto would be useless or politically inexpedient; or because he is undecided about its constitutionality or general merit—as was President Cleveland on the income tax law of 1894—and prefers not to commit himself. Third, he may retain the measure and by so doing kill it, if Congress expires or adjourns before the bill has been in his hands ten days. This procedure is known as the "pocket veto," and from the president's point of view it may be preferable to a direct veto because of obviating the necessity of making a formal explanation to Congress. Many bills are killed in this way, particularly by reason of the fact that large numbers of measures are rushed through Congress in the closing days of a session and require only to be "pocketed" by the president to be kept off the statute book.

Pocket veto

Formerly it was considered that no bill might be signed after Congress had adjourned. Monroe once proposed to sign in this way a measure that had been overlooked, but was advised by his cabinet not to do so, and although Lincoln actually signed one such bill, the Senate objected and a new bill of substantially the same purport was passed and approved in regular form. Practice, wrote ex-President Taft in 1916, makes it clear that bills may not be signed under these circumstances.[1] Within a ten-day period following the close of the second session of the Sixty-sixth Congress in June, 1920, President Wilson, however, signed eight bills, which thereupon became statutes equally with the fifty-one measures signed on the closing day of the session. A statement given out at the time showed that the Attorney-General had held, in a formal opinion, that "the adjournment of Congress does not deprive him [the president] of the ten days allowed by the constitution for the consideration of a measure, but only, in case of disapproval, of the opportunity to return the measure with his

[1] *Our Chief Magistrate and his Powers*, 23-24.

CHAP. XX

reasons to the house in which it originated.[1] It is to be presumed that this new view will establish itself, and that henceforth the president will be enabled, as are the governors in most of the states,[2] to act with some real deliberation on measures passed during the closing hours of a legislative session.

Direct veto

Finally, a bill may be vetoed outright. A pocket veto amounts to an absolute veto, because Congress has no opportunity to reconsider the measure. But a direct veto can be overcome by a two-thirds vote of both houses; if this is done, the bill becomes law notwithstanding the president's opposition. Proposed constitutional amendments, it should be noted, do not require the president's signature, and hence cannot be vetoed. "Joint resolutions," which differ from bills only in a technical way, have, when passed, the force of law, and therefore are subject to veto. But "concurrent resolutions," being mere expressions of congressional opinion, have no legal effect and do not have to be presented to the president; and the rules of each house, not being embodied in bills, are likewise exempt.

Frequency of vetoes

Hamilton, in the essay quoted above, expressed the opinion that the veto would "generally be employed with great caution" and that there would be more danger of the president's "not using his power when necessary than of his using it too often or too much". On the whole, this estimate has been borne out. Not until Andrew Johnson's administration did any president find it necessary to use the veto in defense of his own constitutional rights, and there were fewer than fifty vetoes, all told, before the Civil War. The first six presidents vetoed bills only on the ground that they were unconstitutional or technically defective. Jackson, who in sundry ways made the presidency something different from what it had been before, gave the veto a new meaning by using it to defeat measures admitted to be constitutional and technically correct, but considered objectionable in their aim and content.[3] Yet

[1] L. Rogers, "The Power of the President to Sign Bills after Congress has Adjourned," *Yale Law Jour.*, XXX, 1-22 (Nov., 1920).

[2] See p. 627.

[3] He also claimed and exercised the right to veto bills which he regarded as unconstitutional, regardless of the judgment of the Supreme Court to the contrary. The best illustration is the veto, in 1832, of the bill to renew the charter of the United States Bank. There can be no doubt that in his broader interpretation and use of the veto power Jackson was entirely within his rights. The constitution simply says that if the president "approve" a bill he shall sign it and if not he shall return it. "No better word could be found in the language to embrace the idea of passing on the merits of the bill." W. H. Taft, *Our Chief Magistrate and his Powers*, 16.

Jackson, in eight years, vetoed only nine bills. In the turbulent era of Reconstruction, the veto was employed more freely, and recent presidents have not taken the conservative attitude of their earlier predecessors. Grant vetoed forty-seven bills, Harrison seventeen, Roosevelt forty, and Cleveland three hundred and fifty-eight, chiefly private pension bills. Of seven presidents who made no use of the veto power at all, the latest (prior to Harding) was Garfield.

The most significant thing is not, however, this increase of the number of vetoes; in proportion to the whole number of bills presented to the president, there are probably no more vetoes nowadays than seventy-five years ago. The really important matter is the freedom with which the presidents, as one writer has stated it, "offset their own judgment against that of Congress, not merely on great questions involving the public welfare, and on disputed constitutional questions, but on trivial matters whereon their means of information are not greater or better than those at the command of Congress, and whereon their individual judgment does not appear to be superior to that of the average congressman or senator".[1] In other words, the veto power has been so expanded in use as to become a general revisory power, applicable to all legislation, whether important or not, and whether relating to public matters or to private and personal interests. The result has been to make the president a far more active and potent factor in legislation than he originally was or was intended to be.

This does not mean, however, that the veto power has, in these later days, been employed loosely and irresponsibly. On the contrary, it has commonly been used reluctantly and with all due discretion. Most vetoes have been supported by public sentiment, and very few have been overridden by subsequent action of Congress. Not until Tyler's administration did any bill disapproved by the president afterwards receive the two-thirds vote in both houses requisite to make it law. Pierce was reversed five times, and Johnson fifteen, but Grant only four times, Hayes and Arthur once each, Cleveland, Taft, and Wilson twice each, and the other presidents not at all.[2] In practice, therefore, the veto power tends

Few vetoes overridden by Congress

[1] Stanwood, *History of the Presidency from 1897 to 1909*, 233. For example, President Cleveland once vetoed a resolution providing for the printing of additional copies of a certain map of the United States, on the ground that a better map would soon be available.

[2] E. C. Mason, *The Veto Power*, Appendix D.

to become absolute; only rarely and with great difficulty can a sufficient vote be mustered in the two houses to override an adverse presidential decision. This has led on several occasions to the suggestion that the veto power be weakened by allowing a vetoed measure to be repassed by both houses by a simple majority rather than the present two-thirds; and in 1842 Clay proposed a constitutional amendment to this effect.[1] On the other hand, it has been suggested that the veto be strengthened by requiring that a bill, in order to be carried over a veto, shall be repassed by an affirmative vote of two-thirds of the entire membership of both houses, rather than, as now, two-thirds of a quorum in each.[2]

The question of veto of items

Another, and decidedly more important, proposal looking to the strengthening of the veto power is that authority be conferred to veto single items of an appropriation bill while yet approving the measure as a whole. As matters stand, when an army bill, a rivers and harbors bill, or any other great appropriation measure, is laid before the president, he can only approve or veto the bill in its entirety. Among its scores, and even hundreds, of items he may find several to which he takes exception; they may involve, in his judgment, unjustifiable expenditure or sheer waste. To veto the entire measure would, however, produce friction and perhaps seriously impede the operation of some branch of the government; and, rather than raise these difficulties, the president is almost certain to return the bill to Congress with his endorsement. In this way the interests of public economy frequently suffer. Almost two-thirds of the states have met a similar situation by empowering the governor to veto separate items; and in some instances he is also allowed to reduce the amount carried by an item. The same remedy has been urged for adoption by the

[1] During the Jackson and Tyler administrations the Whigs were continually baffled by the vetoes of a hostile president and by the fact that, while they could carry their measures through Congress by simple majority, they could not muster the two-thirds majority necessary to override a veto. Clay's proposed amendment arose out of this experience. It may be added that in eight states a veto by the governor can be overcome by a simple majority in the two houses of the legislature.

[2] Effort has sometimes been made to show that this higher requirement is already the law. Thus in a case decided by the Supreme Court in 1919 the plaintiff contended that the Webb-Kenyon Act was not a valid piece of legislation, since, after its veto by President Taft, it was passed in the Senate by a vote of two-thirds of the senators present, which was less than two-thirds of the total membership of that body. The court refused to take this view. Missouri Pac. Ry. Co. *v.* State of Kansas, 39 Sup. Ct. Rep., 93. See *Amer. Polit. Sci. Rev.*, XIII, 281-282 (May, 1919).

national government, but thus far without avail. There are, it is only fair to say, two sides to the question: power to veto items would enable the president to discriminate in a wholly undesirable manner, if he chose to do so, between proposed expenditures in which congressmen who supported him were interested and those which were of concern to his opponents; and Congress might fall into the habit, as have some state legislatures similarly situated, of gratifying departments and local constituents by voting appropriations far in excess of the estimated revenues and thus transferring to the president the burden of whittling down the appropriations, and also the official or popular disfavor likely to arise therefrom. The adoption, in 1921, of a budget system may, however, be regarded as having set up a partial safeguard against these possible abuses.[1]

Other modes of control over legislation:

Convening Congress in special session, transmitting messages, and wielding the veto power do not exhaust the president's means of influencing legislation; there are a half-dozen well recognized modes of less direct, but often equally effective, control. The first is the threat of a veto. By letting it be known that he will veto a given bill unless certain features are added to it or other changes are made in it, the president may be able practically to determine the form which the measure will finally take. President Roosevelt went so far as to warn Congress publicly that he would veto certain measures which it had under consideration. Protest was raised against such virtual use of the veto power in advance, but no one could find anything in the constitution or laws to prevent a president from thus making his views and intentions known.

1. Threat of veto

A second source of presidential influence on legislation is the patronage. Long custom has made it the rule that senators and representatives shall be consulted, and shall be permitted to bring forward candidates, when important offices are to be filled in their state or district; and their political power and general prestige among their constituents are determined largely by their success in securing the appointment of such candidates. The president, therefore, holds the whip hand: if congressmen do not accept his ideas on legislation, he can cut them off from a share in the patronage. There is no reason to believe that bald threats

2. Use of patronage

[1] See p. 423. Writing before the budget system was adopted, ex-President Taft expressed grave doubt about the desirability of giving the president the power to veto items. *Our Chief Magistrate and his Powers*, 27-28.

and bargains of this sort are made. Yet members of Congress can hardly be expected to be oblivious to the practical advantages of being numbered among the president's dependable supporters.

3. Personal interviews

A third source of presidential influence is the personal interview. The president cannot appear on the floor of either branch of Congress to take part in debate, or for any other purpose, save to deliver a formal message. But this does not prevent him from discussing measures with the members, individually and in small groups, in his office at the White House, or even in the room set apart for him at the Capitol. Chairmen of committees and other influential members are frequently called into conference, especially when important legislation, *e.g.*, a great tariff bill, is pending; and on such occasions the president may urge or demand that a given measure be postponed, that it be advanced on the calendar, or that a bill be amended in specified ways. He may issue a virtual ultimatum. In any case, his views, promptly carried back to the two houses by the conferees, are not likely to be without influence.[1] Executive control over legislation through this channel was notably broadened by Presidents Cleveland, Roosevelt, and Wilson. There arises, indeed, at this point a real presidential initiative in legislation. For, while neither the president himself nor any other member of the executive branch can actually introduce a bill in Congress, the president may, and occasionally does, bring about the drafting of a measure, which is formally introduced by a supporter and spokesman in the appropriate house. President Roosevelt was the real author of much of the legislation enacted during his seven years in the White House, and President Wilson had hardly less to do with the formulation of the Federal Reserve Act, the Clayton Anti-Trust Act, and other great measures of his first term than with the legislation of the ensuing war period.

The president as party leader

From what has been said, it is apparent that the president derives much of his actual power over legislation from his position as a party leader: he usually consults only his fellow-partisans in Congress on proposed appointments; he commonly seeks interviews with, and initiates legislation through, them alone; he must work in a reasonable degree of harmony with them if much is to be accomplished. Originally, the president was not a party leader;

[1] A familiar example is President Taft's participation in the consideration of the Payne-Aldrich tariff bill of 1909. See F. A. Ogg, *National Progress, 1907-1917*, 33-35.

Washington thought of himself as responsible to no party and leader of no faction. But when parties took definite form and presidents began to be elected as party men, party leadership became as truly a function of the president as it is of the English prime minister; and it is nowadays hardly a less important source of power than is the authority expressly conferred in the constitution. Jefferson, Jackson, Lincoln, McKinley, Roosevelt, and Wilson may be mentioned as presidents who in a preëminent degree dominated their respective parties. Tyler, Hayes, Garfield, and some other chief executives had less influence in this way, and Cleveland was, during his second administration, disavowed by his party following. But in most of these latter instances the circumstances were exceptional, and all pointed to the practical desirability of full and recognized presidential leadership.

His party activities

The president is elected as a party man. He must surround himself with advisers who are of his own political faith. He must depend mainly on his fellow-partisans in Congress for the legislation necessary to the carrying out of his program. He represents the party throughout the whole country, as congressmen do not, and the country looks to him, even more than to Congress, for the execution of the policies to which his party is pledged. Everything that affects the standing and prospects of his party is of consequence to the success of his administration, and therefore of concern to him personally. Not unnaturally, he will expect to have, even though in purely informal ways, the supreme direction of his party's affairs. He chooses the chairman of the national committee and may farther influence the composition of that body and of other party committees; he may take a hand in the selection of congressional and other candidates and may appeal to the voters to give them their support, as did President Roosevelt in the congressional elections of 1906 and President Wilson in those of 1918; he may suggest, and even dictate, what shall be in party platforms, both national and state; he may, indeed, practically dictate his own re-nomination or the nomination of the man whom he favors as his successor, as President Roosevelt forced the nomination of Taft by the Republicans in 1908; and he acts in close conjunction with, and if necessary brandishes the party whip over, his fellow-partisans in Congress as a means of procuring the legislation that he desires. "Under our system of politics," wrote Mr. Taft after retiring from the presidency, "the president is the head of the party which elected him, and cannot escape responsibility either

CHAP. XX

for his own executive work or for the legislative policy of his party in both houses. A president who . . . ignored his responsibility as the head of the party for carrying out ante-election promises in the matter of new laws would not be doing what is expected of him by the people. In the discharge of all his duties, executive or otherwise, he is bound to a certain extent to consult the wishes and even the prejudices of the members of his party in both houses, in order that there shall be secured a unity of action by which necessary progress may be made and needed measures adopted."[1]

Control of the president by Congress

Naturally, the president's actual influence upon legislation depends considerably upon his personality, upon the character of the times, and especially upon whether his party is in control of both houses of Congress. Furthermore, influence and control do not flow in only one direction; the president is himself subject to a certain amount of guidance, and to a large amount of control, from Congress. In the give and take of personal relations with senators and representatives he may be induced to change his views or caused to modify his policy. Defeat of his measures or refusal of his requests may compel him to abandon a program in which he firmly believes. The Senate may reject his nominations to civil and military offices and refuse its assent to the ratification of treaties negotiated under his direction. Either house, or both, may make demands upon him for information which he cannot well withhold, however much he might prefer to do so, or may institute investigations of executive or administrative work for which he is directly or indirectly responsible. Congress may pass laws imposing new duties upon him or his subordinates, and may similarly limit the discretion of executive officers and require them to do given things in a certain way irrespective of the president's wishes. Finally, the House of Representatives may bring the president to trial under impeachment proceedings which, if successful when heard before the Senate, will lead to his removal from office.

Steady growth of presidential power

None the less, the salient fact about the presidency is its steady accumulation of power, in the matter of removals, in the conduct of war, in the use of the veto, and even in the general control of public policy as shaped ostensibly by the legislative branch. The earlier presidents, as we have seen, took a modest view of their power. They were, in the words of a recent writer, "just about what the framers of the constitution expected the incumbents of

[1] *Four Aspects of Civic Duty*, 100.

the office to be".[1] Jackson, however, brought to the position not only an aggressive temper but an impatience with restrictions and with conservative traditions which was characteristic of the section from which he came and of the generation in which he lived. In his hands the presidency became a far more potent force than before; and although after his day the office had its ups and downs, as it passed from stronger to weaker hands and back again, and as the times demanded of the chief executive a vigorous rôle or permitted a more passive one, none of Jackson's successors ever yielded a particle of the power which he claimed, and every fresh advance which they—Polk, Lincoln, Cleveland, McKinley, Roosevelt, Wilson—made became, in turn, a point of departure from which yet more exalted claims to authority were projected.

The need of presidential leadership

The reasons for this enlargement of presidential power are not to be found in considerations of personal ambition and aggrandizement. Most of the presidents, being human, have found pleasure in the exercise of authority; but few, if any, have coveted power for its own sake, and the fear of some men in earlier days that the president would so overbear the other organs of government as to pave the way for monarchy has proved entirely groundless. The president's power has grown, in the first place, because the power of the national government as a whole has grown; merely to keep pace with this general expansion, whose causes have been considered elsewhere,[2] would have entailed large accessions of presidential authority. Equally important, however, has been the increasing necessity of presidential leadership. Experience shows that Congress, when left to its own devices, tends to disintegrate into partisan and sectional elements and to flounder in a bog of contrary purposes. Even if there is capable and recognized leadership in the houses singly, there is usually no one save the president to bring the two branches together in effective support of great policies and measures. More and more, the people look to the president, not simply to speak for them in dealings with foreign governments, but to wield such a coördinating and directing power in domestic affairs as will get the things done that they desire; they expect him to manage Congress, and if he does not do so they pronounce him a failure. "The nation as a whole," a former incumbent of the office has said, "has chosen him [the president], and is conscious that it has no other political spokes-

[1] V. B. Munro, *Government of the United States*, 100.

[2] See pp. 153-154.

CHAP. XX

man. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its president is of such insight and caliber. Its instinct is for unified action, and it craves a single leader".[1]

Roosevelt and Wilson as leaders

President Roosevelt "recognized and acted upon these facts more fully than had any occupant of the White House since Lincoln; and largely on that account his presidency became a notable epoch of constructive legislation and national revival. President Taft inclined to a legalistic view of the chief executive's functions, and hesitated to assert legislative leadership. He failed to get the legislation which the nation demanded; accordingly, the record of his administration was dimmed, and his own political fortunes were damaged. President Wilson promptly assumed a leadership such as not even Roosevelt had conceived. . . . Many times his intervention in the work of law-making was denounced as dictatorial by his opponents, and it was disliked by some members of his own party. But his personal activity became a principal factor in his administration's imposing record of constructive and remedial legislation; and his conception and example of presidential leadership in legislation became his chief contribution to American political methods.[2] President Harding was borne into office on a wave of reaction against the Wilson administration, and, coming fresh from the Senate, he started out to allow Congress to handle its business with a minimum of presidential interference. A few months, however, sufficed to show that the houses were incapable of making headway on this basis, and executive leadership was gradually and cautiously revived on the lines with which the country had grown familiar.[3]

Nothing better illustrates the living, changing, dynamic character of our government than this continuous readjustment, within the unamended provisions of the constitution, of the relations

[1] W. Wilson, *Constitutional Government in the United States*, 68.
[2] F. A. Ogg, *National Progress, 1907-1917*, 227-228.
[3] See *Amer. Polit. Sci. Rev.*, XVI, 46-49 (Feb., 1922).

between the executive and legislative branches. There is no reason to suppose that a state of equilibrium has yet been reached. On the contrary, farther changes are constantly being proposed, and in some instances widely advocated. Especially has it been urged that the subterranean and extra-legal methods of executive influence and leadership now employed be replaced by modes of procedure frankly based on the new relationship that has arisen. Concrete proposals to this end naturally vary. To begin with the mildest, it is suggested that the heads of executive departments, who compose the president's cabinet, be admitted to the floor of Congress, so that they may explain and defend bills in which the administration is interested and answer questions. Being civil officers of the United States, they are ineligible to membership in either house.[1] But it would not be necessary to make them members; Congress can admit and hear any persons to whom it wishes to extend the freedom of the floor. Heads of departments already appear before congressional committees to give information and answer questions. Would it not be better, it is asked, to give the entire membership of either house, or of both houses, a chance to hear what they have to say and to question them on uncertain or contentious matters? In the first Congress executive officers sometimes appeared upon the floor of one house or the other and made statements of fact; in 1865 a bill regularizing this practice in the case of the heads of departments was favorably reported; and in 1881 a Senate committee brought in a similar plan. But the earlier practice never struck root, and all attempts to revive it have failed. A more radical proposal is that the constitution be so amended as to make the heads of departments actual members of one house or the other, with the right to vote and to serve on committees; indeed, one form of the proposal is that they be made chairmen of the more important committees.

Proposals for closer relations between the executive and legislative branches:

1. Heads of departments to have seats in Congress, without votes

2. Heads of departments to be full members of Congress

Still another suggestion looks primarily to an increase of the president's initiative in legislation. At present, this function must be exercised in a roundabout manner, through the agency of senators or representatives who can be got to introduce the president's bills. The simple device of admitting executive officials, whether the president himself or the heads of departments, to the floor of Congress would enable the administration to communicate its measures directly (informally, at all events), and if the heads of departments were made members they could themselves actually

3. Direct presidential initiative of legislation

[1] Art. I, § 6, cl. 2.

introduce bills. By a simple alteration of their rules of procedure, the two houses could fix definite times when administration bills should be presented and considered; and some students of the subject go so far as to suggest that Congress should practically give up its independent power of initiative and content itself with criticizing and acting upon the measures framed and introduced by the executive.

No prospect of adoption of English cabinet system

There is no denying that the theory of separation of powers is gradually losing its hold in this country, and that the establishment of closer working relations between the executive and legislative branches is, from most points of view, desirable, and is increasingly recognized to be so; perhaps three-fourths of all contemporary discussion of government reform centers in this general problem.[1] It will not do to assume, however, that the country is about to adopt the cabinet system of England and other foreign lands, or that it ought to do so. As has been pointed out elsewhere,[2] there is much to be said for the cabinet system. It makes for unity, sensitiveness to popular feeling, and concentration of responsibility. But the success of it in England, or even in Canada and Australia, does not prove that it would yield satisfactory results in the United States, even if its adoption were a practical question among us. In point of fact, its adoption is far from being such a question. Our entire political experience has proceeded on different lines, and to change over from our present presidential form to the cabinet form would entail not only drastic amendments of the written constitution but a reconstruction of the entire theory on which our governmental system is based. Much has been gained by bringing the president and Congress out of their earlier isolation, and there is room for farther improvement in their interrelations; the admission of heads of departments to the floor of Congress, without votes, is practicable, desirable, and, one may venture to add, probable.[3] But it is useless to spend words now on the relegation of the president to the position of titular head of a cabinet-governed country or the relinquishment by Congress of its full power of legislative initiative. If these things ever come about, it will be only after the adoption of

[1] On this question, as related to state and local government, see Chaps. XXXV, XLVII.

[2] See p. 64.

[3] The likelihood that this will eventually come about is increased by the enactment of the budget law of 1921 (See p. 422). The budget is prepared by the executive and it is plausibly argued that the executive ought to have an opportunity to explain and defend it on the floor of Congress.

transitional measures which are themselves as yet quite beyond the horizon.[1]

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[1] For a discussion of what the introduction of the cabinet system in the United States would mean see A. L. Lowell, *Essays on Government*, 25-45.

CHAPTER XXI

THE CABINET AND THE EXECUTIVE CIVIL SERVICE

Volume of executive and administrative work

The work of legislation is of such character that in any government it can be, and usually is, attended to at a single place, and by a comparatively small group of men. Executive and administrative functions, on the other hand, must, by their very nature, be performed throughout the entire country, and they require large numbers of officials of widely varying titles, powers, and importance. In our national government the president is the chief executive, and upon him finally rests the whole burden of responsibility for the execution of the laws and for the performance of other duties, such as the conduct of foreign relations, which are commonly assimilated to executive work. But the president cannot personally execute the laws, or keep and disburse the public moneys, or manage the nation's postal service. There are no more hours in his day than in any other man's, and it is physically impossible for him to give attention to one-tenth part of the work that national officers must do, even within the bounds of a limited section of the country. He acts directly in matters of large moment; he appoints and removes certain officers; and, when circumstances require, he concerns himself laboriously with administrative details. But in the main he looks to his principal subordinates to keep the machinery of government in motion; and for months, and even years, at a time his relations with a given branch of administration may be purely nominal.

Extent of the civil service

The executive civil service, which thus, under the president's supreme direction, carries on from day to day the work of the national government, has grown from a few hundred persons a century ago into a veritable army. On June 30, 1916,—before the great increase which resulted from the entrance of the United States into the World War—it totaled 480,327 officers and employees, and on June 30, 1921, when the special conditions of wartime had largely passed, the number was 597,482.[1] How is this

[1] *Thirty-eighth Annual Report of the U. S. Civil Service Commission* (1921), VII. At the date of the armistice (Nov. 11, 1918), the number was 917,760. The executive civil service, it should be noted, does not include the army, the

great staff organized and controlled? How are its members appointed and removed? How is the government's work divided up among them for supervision and performance? To these matters we must now turn. In the present chapter the system as a whole will be outlined; in the succeeding one something will be said about the ten departments, considered individually.

General features of the departments

A half-dozen features of the general scheme at once suggest themselves as fundamental. (1) The national government, as we have seen,[1] maintains its own full quota of officials and employees, only rarely and incidentally utilizing for its purposes the officials or employees of the states. This differs from the practice in some other federally-organized states, *e.g.*, Switzerland, where local or divisional officers are extensively employed in the administration of national laws.[2] (2) With some important exceptions, the executive and administrative activities of the government are gathered in main branches or divisions, known in most instances as "executive departments", which in every case have been established by act of Congress. The constitution does not set up departments, or say how many departments there shall be, or what they shall be called. It, however, plainly assumes that departments will exist: it authorizes the president "to require the opinion, in writing, of the principal officer in each of the executive departments"; and it empowers Congress to vest the appointment of inferior officers in the heads of departments". Beginning with the departments of State, War, and Treasury, created in 1789, ten departments in all have thus far been established.[3] There are numerous detached boards, commissions, and other agencies; none the less, there is a far greater amount of coördination and centralization than in the administrative systems of the states. (3) There is some overlapping of functions among the departments, and occasionally an official has to do with the work of more

navy, or the judicial establishment. Of the total number of employees in 1921, 78,865 were in the District of Columbia and 518,617 were in parts of the country outside the District.

[1] See p. 155.

[2] Ogg, *Governments of Europe* (rev. ed.), 571. By a wide departure from precedent in this matter, the administration of the Selective Service Act of May 18, 1917, was entrusted to state and local officials. See E. H. Crowder, *The Spirit of Selective Service* (New York, 1920).

[3] The complete list is: State (1789); War (1789); Treasury (1789); Navy (1798); Post Office (head admitted to cabinet in 1829); Interior (1849); Justice (1870); Agriculture (1889); Commerce (1903); Labor (1913). Departments of education, public health, and public welfare, among others, have often been proposed.

CHAP. XXI

than one department. But, speaking broadly, each department is separate from the others in both functions and personnel. (4) In their internal organization the departments vary rather widely, yet certain features regularly appear. In the first place, all are organized under single heads. The constitution does not require that this shall be so; although it is fair to assume that when the framers wrote the provisions concerning department heads they had individual officials, not boards or other groups, in mind. Boards and commissions are employed in most of the detached services, and are very commonly used in the state governments. But every national department is presided over by a single official, known in most instances as a secretary. Furthermore, practically all of the departments have from one to four assistant secretaries and a chief clerk. And the work is distributed among a number of bureaus and divisions, usually with a single head variously known as "commissioner," "director," "comptroller," or "chief"; although the distribution is not always logical or permanent, and the relation of bureau to division follows no clear principle. (5) Heads of departments are directly and fully responsible to the president. Congress can impose duties on them with which the president cannot interfere, and it can remove them by impeachment. But it is the president who is held principally responsible for their official acts. Whatever is done by any one of them is considered as done by the president himself. He, very justly, has almost complete freedom in appointing them; he directs their activities; and he has unrestricted power to remove them. They are answerable to him for all that they do in their official capacity, being therefore in a wholly different position from that occupied by department chiefs in England and other cabinet-governed countries, who are responsible exclusively to the legislature.

Considerations influencing the selection of department heads

As we shall see, the heads of departments occupy a dual position; they are at the same time chief administrators of their several branches of the government service and advisers to the president on questions of public policy, and, secondarily, on party matters. Speaking broadly, they are selected with both the administrative and the advisory functions in mind. Several other considerations, however, enter into the president's choice. First, the appointees must normally be of the president's party. Washington made Jefferson secretary of state and Hamilton secretary of the treasury. But friction arose, and it soon became expedient to bring the chief offices into the hands of men who stood closer

1. Party status

together in political matters. Since 1795 the principle of party solidarity has been closely followed. Cleveland indeed appointed to the position of secretary of state a man who had been considered as a Republican candidate for the presidency.[1] But the appointee had supported Cleveland in the electoral campaign. Taft and Roosevelt each appointed a Democrat as secretary of war. But in both instances the appointee had not been prominent in national politics. The few exceptions merely prove the rule. This regard for party affiliation does not mean, however, that only party leaders are appointed. The earlier tendency to look upon the cabinet as a council of party leaders has practically disappeared. The appointees belong to the party in power at the White House; but, as a rule, half or more of them are not party leaders in any large sense of the term, and some have had no active part in politics whatever.[2]

2. Other grounds

Other practical considerations which more or less influence the president's selection are geographical distribution and the representation of various wings or factions of the party. It will not do to take all of the cabinet officers from the East, or from the West, or from any single section of the country. Although President Wilson's first cabinet included members from eight different states, it was criticized in some quarters because—as was also true for a time during Roosevelt's presidency—three were residents of a single state, *i.e.*, New York. Appointment of representatives of different elements in the president's party is designed, of course, to conciliate opposition and to promote solidarity. A good illustration is President Wilson's appointment of Mr. Bryan as secretary of state in 1913, with a view to winning for the administration the support of the more radical wing of the Democratic party. Still another powerful factor is personal friendship and favor. Every president takes into his official family men whom he knows but slightly. But he is likely to include also one or two men who, whatever other claims they may have, are first of all personal friends. President Jackson added to the political liveliness of his time by appointing his friend Major Eaton secretary of war; President Grant made his patron

[1] Walter Q. Gresham.

[2] Wilson, *Constitutional Government in the United States*, 75-76. On the other hand, of course, members are occasionally chosen mainly or solely because of their services as party leaders or officers. A single example is the selection of Mr. Will H. Hays for the postmaster-generalship by President Harding, whose campaign the appointee, as chairman of the Republican national committee, had managed.

CHAP. XXI

of early days, E. B. Washburne, secretary of state; Presidents Fillmore, Harrison, Cleveland, and McKinley found portfolios for their law partners; and President Roosevelt made several appointments in which the personal factor was prominent. All told, however, a steadily increasing proportion of cabinet officers are chosen for their administrative ability. Frequently they are men who have not been in politics, but have made names for themselves in the management of large professional or business interests. The secretary of the treasury is especially likely nowadays to be a man of this type. Perhaps three-fourths, on an average, have had previous experience in public office of some importance; about half have served in Congress, and a considerable number have been governors of states or ministers to foreign countries. Contrary to early practice, very few are now carried over from one administration to another, even when there is no change of the party in power.

Functions of heads of departments:

Heads of departments exercise their functions both singly and collectively: singly, they are in charge of the several great branches of administration; collectively, they form the president's cabinet.

1. Direction

Subject to the directing power of the president and to a certain amount of control by Congress, the department head, as such, directs and supervises the work of all bureaus, divisions, officers, and other agencies in the department under his care. He cannot personally watch the whole of it, but he must keep himself informed upon it, and must be at all times ready to assert his superior authority with a view to increased harmony and efficiency.

2. Appointment and removal

In the second place, he exercises considerable control over the personnel of his department. This he does mainly through the appointment of such inferior officers as Congress, under the familiar constitutional provision dealing with appointments,[1] authorizes to be designated in this way. Many of the positions thus arranged for are now on the merit basis, and this narrows the appointing officer's discretion. The power is, none the less, an important one; and it is reinforced by a somewhat restricted, yet substantial, power of removal.

3. Issuing regulations

Another very important function is promulgation of regulations covering various aspects of the department's administrative work. The president, as we have seen, has an extensive ordinance power.[2] But in many cases the administrative regulations issued by virtue of this power are prepared in the departments and issued

[1] Art. II, § 2, cl. 2.

[2] See p. 261.

in their name, or even in the name of a bureau or division. The president may direct such regulations to be issued, and may insist on seeing and approving them before they are sent out. But in most cases the department officers may themselves take the initiative. Indeed, each department head is authorized by statute "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it";[1] and also to make appropriate rules to secure a proper examination of accounts. Furthermore, specific ordinance powers covering other matters have been conferred on particular department heads, chiefs of bureaus, commissions, and other administrative agencies; for example, the secretary of the treasury has been authorized to prescribe regulations for enforcing the customs and internal revenue laws, and for preventing the introduction of contagious and infectious diseases at our ports, and the secretary of agriculture has been authorized to make rules governing the importation and interstate movement of animals and plants, the protection of forest reservations and of migrating birds, and the execution of acts of Congress relating to meat inspection.[2]

4. Deciding appeals

Still another important thing that the department head has to do is to decide disputes arising out of the acts of his subordinates. In the administration of the laws governing such matters as immigration, foreign and interstate commerce, taxation, and public lands great numbers of controversies inevitably come up. Persons adversely affected may feel that an official has exceeded his powers, or that he has reached a decision not warranted by the facts in the case; and fairness demands that an opportunity be allowed for a reconsideration of the decision or action. Conceivably, all such questions might be carried to the courts. But it has been pointed out that, while appeal to the courts is proper when the construction of a law is involved, such appeal, if permitted in the general run of disputes arising out of the ordinary daily transactions of the departments, would "entail practically a suspension of some of the most important functions of government".[3] Hence, except under the condition mentioned, appeal normally lies only to

[1] Rev. Stat., § 161.

[2] This subject is clearly treated in J. A. Fairlie, "Administrative Legislation," *Mich. Law Rev.*, XVIII, 181-200 (Jan., 1920).

[3] School of Magnetic Healing *v.* McAnnulty, 187 U. S., 94 (1902).

CHAP. XXI

higher administrative officials or boards, including the heads of departments; and in many kinds of cases the decision of the department head is final, although in others there is appeal to the president himself.

5. Giving information

Finally, it is the duty of the head of a department to give both the president and Congress information and advice on matters pertaining to his branch of the service. The Treasury and Post-Office departments were organized without reference to presidential control, and their heads report to Congress directly. In the acts creating the State, War, and Navy departments the president's directing authority is expressly recognized, and in the measures establishing the remaining departments it is clearly implied. In practice, however, all departments are on a common footing in this matter; all make reports which quickly become the common property of the president and Congress, and both of these superior authorities may call upon them at any time for information. The president usually asks the department head orally for any data that he desires, although he may make the request in writing. Congress, or either house, makes its requests through the medium of resolutions. Armed with the power of removal, the president is able to enforce compliance. But Congress is in a different position; if the department head refuses to accede to its request, and is supported by the president in this attitude, it is helpless, unless it is willing to resort to the extreme expedient of impeachment. The Supreme Court has held, furthermore, that when the head of a department is required to give information he may do so through subordinates, rather than in person.[1]

The cabinet

Collectively, the heads of departments form the cabinet. As early as 1781, when the first executive departments were created by the expiring Continental Congress, it was suggested that their principal officers should consult together as an advisory council, and in the convention of 1787 several plans for a council—a council of appointment, a council of revision, a general advisory council—were considered. No proposal on the subject, however, was ever adopted, and to this day the cabinet has no constitutional, and only an indirect statutory, basis.[2] Like its English counterpart, it is a product of spontaneous historical development.

[1] Miller *v.* Mayor of New York, 109 U. S., 394 (1883).

[2] On the way in which the term "cabinet" was first brought into the statute law see H. B. Learned, *The President's Cabinet*, 157-158.

Beginnings

From the beginning of his administration, Washington, in addition to calling on the heads of departments for written opinions, as authorized in the constitution, orally consulted various principal officers, including the department heads, and in 1791 meetings began to be held which closely resembled the cabinet meetings of later days. In 1793 the disturbed international situation caused these consultations to become more frequent, and the cabinet—the name also came into use at this time—began to take on the aspect of a recognized and accepted institution. Some people shook their heads and predicted that from the "cabinet conclave", unknown to the constitution, would flow all manner of abuses. But, under the existing circumstances, the development was inevitable. In common with other public men of the day, Washington originally supposed that the Senate would serve substantially as an executive council. But when he appeared on the floor of that house to advise on the subject of Indian treaties the demeanor of the members clearly showed that they did not take this view of their functions, and the expected relationship did not develop. Furthermore, contrary to practice in England and in the colonies, the courts, in 1793, assumed the position that they would not give opinions, even to the president, except in the decision of actual cases; hence the need of consultation could not be met in that direction. Finally, the House of Representatives discouraged, and practically prevented, heads of departments from appearing in person before it in order to submit reports and give explanations. The effect of all of these things was to force the president and heads of departments into a more isolated position, and to compel them to rely one upon another, in a measure which was quite unexpected, for opinions and advice.[1]

Varying relations with the president

Originating thus almost at once after the government under the constitution was set going, the cabinet has had a continuous, and on the whole an honorable, history to the present day. It remains, however, what it was at the outset—a purely advisory body. The president can make much use of it, or little, or none at all, as he chooses. Looking upon the heads of departments as clerical officers, and preferring the advice of his personal friends, official and otherwise, Jackson early discontinued cabinet meetings altogether;[2] and some other presidents, *e.g.*, Grant, have leaned

[1] The beginnings of the cabinet are fully described in Learned, *op. cit.*, Chap. v.

[2] W. MacDonald, *Jacksonian Democracy*, 50-51.

CHAP. XXI

but lightly on their cabinet advisers. On the other hand, certain presidents, *e.g.*, Pierce, have consulted their cabinets at every turn and have usually followed the advice received.

Meetings and influence

Nowadays the cabinet meets ordinarily once or twice a week, except during vacation periods, and, as has been pointed out, is joined by the vice-president.[1] Such subjects are discussed as the president brings up, or as—usually with the president's assent given in advance—are brought up by one of the department heads. Naturally, time is given chiefly to questions involving the general policy of the administration, such as the attitude to be taken toward Mexico, or toward a soldier bonus bill, or toward an increase of the army. But there are no limits except those of time and interest, and in practice the discussions range very freely and broadly over the government's work and policy. Proceedings are extremely informal. There are no rules of debate; free interchange of opinion takes place on a conversational basis; only rarely is there a vote; no minutes or other official records are kept. Furthermore, such decisions as are reached are mere recommendations. Just as the president is free to submit or not submit a subject for consideration, so is he free to make any final disposal of the matter that he likes. Ordinarily, he will be influenced by the opinion of the men whom he has specially selected as his advisers. But if he thinks that their advice is not sound he is under no compulsion to follow it. It is he, not they, that will have to bear responsibility before the country for whatever is done. "Seven nays, one aye,—the ayes have it," announced Lincoln, following a cabinet consultation in which he found every member against him. Cabinet discussions bring out useful information and opinion, clarifying views, and develop morale in the administration. They help the president choose his course on pending and proposed legislation. But they do not culminate in decisions of policy by mere numerical preponderance.

The civil service

Thus far we have spoken only of the heads of departments. What of the great body of officers and employees who work in the departments—from assistant secretaries and chief clerks at the top to immigration inspectors and letter carriers at the bottom—as well as in the detached offices and services? Of their functional organization, something will be said in the next chapter. Here we may take note of some aspects of their recruitment, tenure, compensation, and general status.

[1] See p. 229.

Rise of the spoils system

The first fact to be observed is that whereas from the second administration of Washington onwards appointments were regularly made with reference to the appointee's political affiliations, there were few removals for political reasons until the time of Jackson. An act of 1820 fixing a four-year term for district attorneys, collectors of public moneys, and some other groups of officials, looked, however, to more frequent rotation in office;[1] and the election of Jackson, in 1828, threw down all bars. Jackson himself believed that prolonged tenure of office leads to laxness and corruption and considered that, in any case, one man has as much right to public office as another;[2] and he gave his views practical application, not indeed by making a "clean sweep" of anti-Jacksonian office-holders, yet by removing some two thousand officers of all grades during his first year. The blame for fastening the spoils system upon the country is, however, not to be laid entirely, or even mainly, at Jackson's door. In the first place, the system was already prevalent in state and municipal governments, being now merely carried over into the national government. In the second place, the elaboration of party machinery and the intensification of party politics must inevitably have led to an increased use of public offices as rewards for party service. Finally, Jackson's views on office-holding, while abhorred by many people, were warmly endorsed by those forces of the new democracy, especially in the West and South, that had been chiefly responsible for his election. When, in 1832, William L. Marcy, a young politician of New York, summed up the arguments of the Jacksonian newspapers in the remark, "To the victors belong the spoils," he coined a phrase which struck home;[3] removals, as well as appointments, for party reasons became part of the accepted order of things.

Beginnings of reform

Men, however, could not wholly close their eyes to the system's undesirable workings. Experienced and worthy public officials were ousted on all sides to make room for political henchmen. The public services were thrown into demoralization every time a change of administration took place. The president was harassed almost beyond endurance by place-seekers and their friends, and congressmen tended to become mere solicitors and dispensers of

[1] C. R. Fish, *The Civil Service and the Patronage*, 65-70. Subsequent statutes brought many additional groups of officers under the four-year rule, *e.g.*, all postmasters.

[2] Fish, *op. cit.*, Chap. IV.

[3] The phrase was used in a speech in the United States Senate. *Register of Debates in Congress*, VIII, Pt. 1, 1325.

patronage. As early as 1853 Congress undertook, in a feeble way, to improve conditions by requiring that certain clerkships in Washington should be classified on a basis of compensation and that candidates should be appointed to these positions only after examination by the head of the appropriate department. Even on this limited scale, the reform came to nothing; only "pass" examinations were required, and the administration of them soon grew very lax. After the Civil War the need of a change of policy became greater than ever before, and in 1871, Congress, with the approval of President Grant, passed an act authorizing the president to prescribe regulations for admission to the civil service and to ascertain the fitness of candidates. Grant thereupon appointed our first civil service commission. George William Curtis, a leading advocate of the reform, was made chairman; and a system of competitive examinations was forthwith introduced. Before the plan could be very generally applied, however, differences of opinion arose between the president and the commission, and in 1873 Curtis resigned. In 1875, furthermore, Congress refused farther appropriations. The commission lived on, and in 1877 the examination system was revived for the post-office and customs service of New York City. But the general reform contemplated in the original legislation failed of realization.

The act of 1883

The cause was not lost. Able men turned their best energies to its support; national and state civil service reform associations were organized; recent reforms in Great Britain were investigated and made familiar to American readers.[1] *Harper's Weekly,* the *Nation,* and other influential journals took up the fight; political parties repeatedly put planks on the subject in their platforms; and the assassination of President Garfield by a disappointed office-seeker in 1881 supplied the last necessary impetus. Early in 1883 Congress passed the Civil Service Act[2]—commonly known as the Pendleton Act—which, with certain amending statutes, is to this day the fundamental law governing admission to and rights in the federal service.

At the outset, the reform did not extend far. The secretary of the treasury and the postmaster-general were directed to classify

[1] Especially through a book entitled *The Civil Service in Great Britain* (New York, 1880), written by an ardent reformer, Dorman B. Eaton, whom President Hayes commissioned to study the British system. After ineffectual preliminary steps, Great Britain adopted a comprehensive merit plan by an order in council of 1870. A. L. Lowell, *Government of England,* I, Chap. VII.

[2] *Statutes at Large,* XXII, 403-407.

Expansion of the merit system

certain subordinates in their departments, with a view to the application of the merit principle to these positions; and the president was authorized to require, at his discretion, other heads of departments and offices to take similar action. In the first year the provisions of the law applied to somewhat less than fourteen thousand employees. Gradually, however, the number was increased. By 1897 it was 87,108; by 1905 it was 178,807; and by 1916 (the last year before the abnormal increase of government employees on account of the World War) it was 296,926, in a total of 480,327 persons in the executive civil service, or approximately sixty-two per cent. In part, the increase arose from acts of Congress placing specified positions, whether new or old, in the "classified service", *e.g.*, an act of 1902 classifying the employees in the census office. In the main, however, it arose from successive executive orders issued in pursuance of authority conferred in the statutes. Thus President Roosevelt, in 1901-02, brought into the classified service the rural free delivery employees, and in 1908 the fourth class postmasters in the region north of the Ohio and east of the Mississippi; and President Taft, in 1910, similarly brought in all assistant postmasters and clerks in first and second class post-offices, and in 1912 all remaining fourth class postmasters. Aside from some twenty-five thousand offices which are specially exempted because of their confidential nature or other special aspects, the principal elements in the civil service to which the merit system does not now apply are the officials appointed by the president and Senate—the incumbents of the so-called "presidential" offices, somewhat over fourteen thousand in number [1]—and, at the other end of the scale, common laborers.

The Civil Service Commission and its staff

The main objects of the merit system are to ensure appointment on the ground of fitness and to protect the office-holder or employee against removal for party reasons. Under the general direction of the president, its administration is carried on by the Civil Service Commission, a board of three appointed by the president and Senate, under the requirement that not more than two members shall be "adherents of the same party." A staff of some three hundred and sixty persons—examiners, clerks, etc. —is maintained at Washington; the country (including the insular dependencies) is divided into thirteen civil service districts, each in charge of a secretary appointed by the commission; and the machinery is completed by approximately twenty-six hundred

[1] In 1921. Before the war period the number was about ten thousand.

CHAP. XXI

local examining boards, made up of collectors of revenue and other national officers who are called into special service for this purpose from time to time by the commission. The law requires that examining boards shall be set up at sufficiently numerous places to enable candidates to attend examinations without undue expense or loss of time.

Examinations

The steadily increasing number of officials and employees who come under the law are affected by its provisions in three principal respects, namely, as to appointment, tenure, and promotion. Appointments are made only on the basis of the showing of candidates in competitive examinations. These tests are arranged for by the commission, announced in advance in newspapers and on placards displayed in post-offices and other public places, and administered in various cities throughout the country by the examining boards. They may be either written or unwritten, or both. Candidates for the great bulk of positions of a clerical or other subordinate character are examined in groups and exclusively in writing; those seeking positions which call for scientific, technical, or other special attainments are rated competitively in respect to experience, education, training, and fitness, as ascertained usually by interviews and testimony rather than by a formal written examination. In the one case the examination is said to be "assembled"; in the other, "non-assembled." In the preparation of examination questions, the commission enlists the aid of experienced persons in the several departments, and occasionally of outside experts.

Contrast of American and English systems

The law requires examinations to be "practical in their character" and, so far as possible, to "relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed". Herein our American system differs sharply from the English system. In England the competitive principle is carried nearer to the top of the government service than with us; public service is looked upon to a greater extent as a profession, and even a career; and the main object of the examination system is to recruit the service from young men who expect to spend their lives in the public employ and whose education and native ability make it probable that they will rise from one grade to another and steadily grow in usefulness as administrators. Hence English examinations are framed mainly with a view to testing the candidate's general attainments, and especially his in-

tellectual capacity. Mathematics, history, the classics, science—these and other branches of higher learning enter prominently. Even the examinations for positions of a purely clerical nature are conducted on this principle, although naturally they are based upon more elementary subjects. Under the American plan, the object is not, save incidentally, to test general attainments and capacity. It is, rather, to ascertain the applicant's technical proficiency and present fitness for the kind of work that he seeks.[1] "The result is startling. In England the highest positions are filled by examinations as difficult as the honor examinations in the best universities, while the lower positions require considerably more training than is obtained in the average American high school. As a result, the English service attracts to it a highly educated class, untrained it is true in the technical duties of their position, but fitted to develop into very useful and able officials. In the United States, the examinations, except for the positions requiring scientific or technical knowledge, in general require not much more than the ordinary high-school education, together with some technical proficiency. As a result, the candidates do not have the education and general ability of the English officials and are frequently men of less capacity than are found in private enterprises".[2]

Formerly, aliens were permitted to take the examinations, and occasionally they received appointments. Examinations nowadays, however, are open only to citizens, except in the rare event of a lack of citizen applicants. There is no fee, and the number of persons examined is usually far in excess of the number of places to be filled.[3]

How appointments are made

On the registers of the Civil Service Commission are kept the names of all persons who have passed the various examinations with an average grade of seventy. Appointment, of course, withdraws a name from the list. But it is dropped in any event at the end of a year and can be reinstated only by another examination. When a clerk or stenographer or other employee in the classified

[1] Even so, the complaint is often heard that our examinations are too "scholastic" or academic. See a reply to this charge by Chief Examiner Wales, *Thirtieth Annual Report of U. S. Civil Service Commission* (1913), 28-29.

[2] E. Kimball, *National Government in the United States*, 229. The English and American systems are farther compared in R. Moses, "The Civil Service of Great Britain," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LVII, No. 1 (1914), Chap. IX.

[3] Thus in the fiscal year ending June 30, 1921, a total of 303,309 were examined, 203,209 passed, and 101,711 were appointed.

service is needed by a department, the commission supplies the appointing officer with the names of three persons who stand highest in the appropriate list of eligibles. The officer appoints one of the three, and the other two resume their places on the waiting list. If no one of the three is appointed, the officer must be prepared to assign some good reason when asking for farther names. Every appointee is put on probation for a period of six months (or longer, if the commission and department agree), and the appointment becomes definitive only if he is retained beyond that time. The free working of these arrangements is, however, obstructed by two special statutory provisions. Disabled veterans (including those who saw service in the World War), if honorably discharged, are given a preference by having their names placed ahead of all others if they have attained a grade of sixty-five; and an attempt is made—although the rule cannot be fully carried out—to apportion appointments in the departments at Washington among the several states and territories and the District of Columbia upon a basis of population, regardless of the relative rating of the applicants.

Protection against removal

An essential feature of the merit system is security of tenure. There is, of course, no absolute guarantee. Indeed, only one positive restraint is put upon the officer having the power to remove, namely, that no official or employee may be removed for refusal to render political, *i.e.*, party, service or to contribute to a political fund; and the courts have repeatedly held that, the power to remove being an incident of the power to appoint, that power is not to be regarded as cut off by any of the regulations associated with the merit system. No person, whether under the merit system or not, may be removed for the reasons mentioned; and an act of 1912, incorporating a former rule of the Civil Service Commission, specifies that no person in the classified service shall be removed except "for such cause as will promote the efficiency of the service." But it is open to the president or other appointing authority to remove any one of his appointees whom he judges to be inefficient, dishonest, or otherwise a hindrance to good administration; although the reasons for the action must be given in writing, and the person whose removal is proposed must be allowed an opportunity to answer any charges brought against him.

Practically, the merit laws, upheld by a growing public sentiment and by a high sense of honor on the part of the presidents,

Restraints on political activity

give the bulk of government employees substantial assurance of being retained in the service as long as their work is satisfactorily performed. In return for this protection, one main requirement—in addition to efficient discharge of duty—is made of them, namely, that they shall abstain from activity in party politics. They are not disfranchised, and they are at liberty to talk privately about political matters. But, in common with all other officers in the executive service, they may not use their official authority or influence to coerce the political action of any person or body, or to interfere with an election or influence the results thereof, and they may not solicit or receive contributions for political purposes from any national officer or employee. Furthermore, under a presidential order of 1907 applying only to members of the competitive classified service, they may "take no active part in political management or in political campaigns"—a rule which has been construed by the Civil Service Commission to forbid membership in party conventions, addressing party caucuses, conventions, or other gatherings, participating in the preparation of party resolutions or platforms, serving on party committees, giving public expression to political views, assisting in getting out the voters on election day, serving as an election officer, distributing campaign literature or emblems, publishing anything in the interest of a particular candidate or party, and a long list of other activities of a partisan aspect.[1] Alleged violations of any of these regulations by members of the competitive service are subject to investigation by the Commission, and many cases are looked into and reported upon every year.[2] The commission itself, however, has no power of removal; and it has frequently complained that its recommendations have not been carried out by the authorities vested with that power. Officers who stand outside of the competitive classified service, *e.g.*, the heads of departments, are not forbidden, except as indicated above, to engage in political activity; and, in the case of such officers, at all events, as have to do with the determination of the policies of the administration, such activity is not improper. The latitude that is allowed is, however, often abused, and it would be well if the Civil Service Commission were given, in accordance with its repeated recommendations, the

[1] *Thirty-third Annual Report of the Civil Service Commission* (1916), 35-36.

[2] Thus in 1916 twenty-seven employees were separated from the service for political activity, three were demoted, fifteen were suspended without pay, and forty were reprimanded or warned.

CHAP. XXI

same right to investigate and report on cases of alleged excessive political activity outside of the competitive service which it has long exercised inside that service.

Promotions

A necessary feature of an adequate civil service system is an arrangement for promotion on the basis of merit. The act of 1883 provides that no person shall be promoted in the classified service "until he has passed an examination", or is shown to be specially exempted from such examination by law; and formal competitive examinations for promotion are regularly held. Experience, however, has taught that the fairest and best basis of promotions is, not set examinations, however searching, but continuous records of employees' diligence, punctuality, faithfulness, resourcefulness, and accuracy. Accordingly, an act of 1912 required the Civil Service Commission to establish a system of "efficiency ratings" for the classified service in the District of Columbia, these ratings to be based on efficiency records systematically kept in the several departments, and to be used by appointing officers, along with the results of such examinations as might be held, in authorizing promotions. A Division of Efficiency, created in 1913 as an arm of the Civil Service Commission, became, in 1916, an independent Bureau of Efficiency, charged with receiving, tabulating, and making constantly available the efficiency records of employees in the national capital, and with investigating the administrative needs of the service relating to personnel in the several departments and independent establishments. Minimum ratings are prescribed which must be attained by an employee before he can be promoted; also ratings below which he cannot fall without being demoted, and still others which automatically entail dismissal. Obviously, the system is somewhat mechanical. Injustice may be done, especially if personal likes and dislikes are allowed to enter into the ratings made up by supervising departmental officers. But in view of the enormous number of employees involved, it is difficult to see what better plan could be adopted. At all events, the present scheme is much better than none.

The Bureau of Efficiency

Problem of extending the merit system upwards

The farther improvement of the executive civil service presents several difficult problems. The first is the extension of the merit principle to important classes of positions to which it does not now apply.[1] We have noted that in England the competitive sys-

[1] The proportion of federal officers and employees now (1922) included in the classified competitive service is approximately what it was in 1916, *i.e.*, about two-thirds.

tem is carried well toward the top of the official scale: in the departments the dividing line is between the "permanent" under-secretaries, who commonly attain their positions by promotion, and the "parliamentary" under-secretaries, who are regarded as ministers and, as such, are appointed on a party basis. In our own country there is no such clear dividing line, but at all events the merit system terminates decidedly farther down. The heads of departments are, or at least may be, appointed on a party basis. The same is true of assistant secretaries, and to a large extent of heads of bureaus and special services, although the increase in the number of scientific bureaus (notably in the Department of Agriculture) in recent years has steadily enlarged the number of bureau chiefs who, originally selected mainly for their professional standing, hold office virtually on good behavior, though nominally removable at the pleasure of the president. Outside of Washington, the principal officers in large portions of the government service still stand outside the merit system, *e.g.*, in the customs service, the internal revenue service, the mint and assay services, the public lands service, the reclamation service, the immigration service, and the field services of the Department of Justice, embracing the district attorneys and marshals. Appointments to practically all of these higher positions are made by the president and Senate, and the president has no power to put them in the classified competitive service; although there is nothing to prevent him from setting up a system of tests by which to determine what men he will *nominate* to the Senate for any of the places in question—a thing which President Wilson, in 1917, actually did in connection with the eleven thousand first, second, and third class postmasterships, after Congress had failed to pass a law putting these positions in the classified competitive service. Full incorporation of such groups of officials in the competitive service could be accomplished only by act of Congress abrogating the "advice and consent of the Senate" and vesting the appointments in the president alone, or, perhaps better, in the heads of departments, accompanied with an abrogation of the four-year term (or other fixed term) in so far as it now applies. Admittedly, such action—which was, indeed, twice recommended by President Taft in 1912, without result, and has been endorsed in principle by President Harding—would be exceedingly difficult to bring about: politicians, particularly in the Senate, would be pretty solidly against it. For the present, more is to be expected from volun-

Action of Congress necessary

CHAP. XXI

tary executive action, such as that of President Wilson already mentioned; although, obviously, a reform resting on this basis is less stable and secure than one resting on the mandate of the civil service law.

Need of such extension

However accomplished, the reform is greatly needed. Economy and efficiency throughout the executive service depend very largely on the capacity and experience of these higher officers; political appointments here have a demoralizing effect on the service from top to bottom; with these superior positions on a political basis, subordinates have little incentive to try to work up, no adequate plan of promotions is possible, and the civil service cannot be made a career, capable of attracting men of caliber, as it is in England and other European countries.[1] Unquestionably, such officers as have to do in any important way with policy-framing, *e.g.*, the heads of departments, ought to continue to be selected as now, with a view to harmony with the Administration; and, admittedly, candidates for the higher posts cannot be tested satisfactorily in the same way that applicants for admission to the inferior grades of the service are examined. But most of the officials in mind have nothing to do with the determination of policy; and there are well-known and adequate modes of ascertaining the fitness of candidates, no less for places of responsibility in the government service than for positions of trust in great banking and business establishments.[2]

The problem of compensation

One other problem may be mentioned, namely, that of adequate compensation. Partly because of a somewhat scornful attitude toward the appointed official or employee as a "feeder at the public crib", partly because, despite repeated admonitions by the Civil Service Commission, Congress has always left the determination of the rates of compensation to the haphazard decisions of the several appropriation committees, no just, adequate, and systematic salary scale has ever been put into effect.[3] Speaking

[1] The Civil Service Commission testifies that the number of graduates of higher institutions applying for examination has fallen off greatly, and the lack of opportunity for merited advancement is assigned as a principal reason (Report for 1921, p. xxxiv).

[2] In its annual reports the Civil Service Commission strongly urges the extension of the classified service to include all positions, with few exceptions, which do not involve the determination of administrative policies, and which are part of the permanent operating force of the government (Report for 1921, pp. xii-xiv). Cf. J. A. McIlhenny, "The Merit System and the Higher Offices," *Amer. Polit. Sci. Rev.*, XI, 461-472 (Aug., 1917).

[3] A salary classification adopted in 1853 is still nominally in effect. But it long ago ceased to bear any real relation to the organization and needs of the service.

broadly, compensation has been sufficiently liberal at entrance into the service; and for this reason, as well as because of the lure of public office and connections, there has ordinarily been little difficulty in recruiting as many beginners as are needed. Compensation higher up in the scale is progressively inadequate, at all events within the range of the competitive service, and the rates for the higher technical and supervisory posts are in many instances absurdly low. As a result, able and ambitious young men are discouraged from seeking to enter the service; employees of long standing find themselves underpaid, in comparison with employees of equivalent experience in private business; and the whole service suffers in quality and morale. Under the auspices of a joint congressional commission on reclassification of salaries in the departments in Washington, appointed in 1919, and of a separate commission of the same sort on the postal service, a full study of this subject has been made and a plan of standardization has been presented to Congress.[1] "The United States government, the largest employer in the world," says the report of the general committee, "is without a central employment agency having adequate powers; in short, without an employment policy. This lack of comprehensive and consistent employment policy, and of a central agency fully empowered to administer it, has produced most glaring inequalities and incongruities in salary schedules, pay-roll titles, and departmental organizations, with much resultant injustice, dissatisfaction, inefficiency, and waste." A full solution of the problem involves not only the elimination of preventable duplication in the services, accompanied by more liberal appropriations for the offices and services which remain, but, as the commission suggests, the establishment of a separate, central, administrative agency charged with continuous supervision and control over compensation rates and readjustments.

Retirement allowances

Meanwhile, after a decade of agitation, some relief has been found, through a different channel, in an act of 1920 creating a compulsory part-contributory retirement pension system for all employees in the classified service.[2] The government deducts two and one-half per cent of the salary or other compensation of such

[1] Report of the Congressional Joint Commission on Reclassification of Salaries, 66th Cong., 2nd Sess., H. Doc. 686 (March 12, 1920). The reclassification of postal employees has gone into effect; and the Bureau of Efficiency is engaged (1922) on a reclassification of about 150,000 employees in other field services.

[2] *Stat. of U. S.*, 66th Cong., 2nd Sess., Chap. 195.

employees, and adds to the "civil service retirement and disability fund" thus created such amounts as may be necessary to enable it to pay retiring annuities on a sliding scale fixed in the act. The retirement age for railway postal clerks is sixty-two, for city and rural letter carriers, postoffice clerks, and mechanics, sixty-five, and for all other employees, seventy. When an employee reaches the specified age he is automatically separated from the service, unless recommended by his department and certified by the Civil Service Commission for continuance. If he has served less than fifteen years, he gets nothing. But if he has served at least that long, he is entitled to an annuity, ranging, according to the length of his service, from thirty per cent to sixty per cent of his average salary for the last ten years, not to exceed $720 per annum where the period of service has been thirty years or more. There is also provision for annuities for employees who, before reaching the retiring age, and through no fault of their own, become "totally disabled for useful and efficient service." This new system does not touch the general problem of compensation, except as it sets up a much-needed safeguard for the lower grades of employees against utter dependency in ill-health and old age; and it merely brings the United States abreast of the principal European countries in caring for the multitude of men and women who spend their lives doing the government's routine work with little or no prospect of promotion or other betterment. The adoption of the plan is, however, prophetic of other measures that will put the government service in all of its branches on an improved basis.[1]

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CHAPTER XXII

THE DEPARTMENTS AND THEIR WORK

The executive departments next to be studied

In the preceding chapter we have considered various aspects of the executive branch of the national government taken as a whole—the origin and basis of the departments, the functions of department heads and the relations of these officials with the president, the past and present modes of selecting candidates for appointment to subordinate offices and employments, and some of the problems involved in maintaining the civil service on an economical and efficient basis. In order to see more clearly, however, what the organization really is and how it functions, it is necessary to take note, one by one, of the main branches of administration, *i.e.*, the ten so-called "executive" departments. Several important commissions and other agencies not included in any one of the departments, *e.g.*, the Civil Service Commission just mentioned, are sufficiently described at various places in other chapters.[1]

1. Department of State

The first executive department established after the constitution went into effect was a department of foreign affairs, continuing such a department originally created by the Continental Congress in 1781. It soon became desirable, however, to assign to this department certain duties which had no relation to foreign affairs, and hence in less than two months the department was reconstituted (September 15, 1789) as the Department of State; and this broader character and name it has ever since borne. The department's main function is, and has always been, to manage, under the president's direction, the official dealings of the United States with foreign nations. But it also performs much of the work undertaken in other countries by a "home department" or ministry of the interior. Thus its head, the Secretary of State, officially receives the laws of Congress, promulgates them, and files the original copies for preservation; keeps the

[1] Civil Service Commission, p. 301; Bureau of Efficiency, p. 306; Interstate Commerce Commission, p. 447; Federal Trade Commission, p. 452; Tariff Commission, p. 418; Farm Loan Board, p. 429.

"Home" functions

great seal of the United States and affixes it to executive proclamations, to various commissions, and to warrants for the extradition of fugitives from justice; proclaims the admission of new states; transmits constitutional amendments as adopted by Congress to the states, receives official notice from the governors of the action taken, and proclaims amendments which have been duly ratified; calls on the governors of the states after a presidential election for authentic lists of the electors chosen and transmits the information to Congress; and performs other similar services as required by law. After the creation of the Department of the Interior, in 1849, certain miscellaneous domestic functions formerly exercised by the State Department were transferred to the new branch, although not in some instances until after considerable delay. Patent administration was so transferred in 1849; the supervision of census-taking in 1850; the granting of copyrights in 1859; and superintendence of territorial affairs in 1873. The department remains, however, to a considerable extent a home office, charged especially with keeping archives and proclaiming public acts and with serving as a medium of communication between the president and Congress on the one hand and the authorities of the states on the other.

Conduct of foreign relations

We have seen that the president may speak to the world, or to a particular nation, through the medium of a message to Congress;[1] and we know that he may personally converse with the representatives of foreign states, or even put himself at the head of a commission charged with the negotiation of a great international settlement. Normally, however, he acts in foreign affairs through the Secretary of State and the subordinate officials of the State Department; and thus it comes about that the department negotiates treaties, carries on correspondence with foreign states, gives instructions to our ambassadors, ministers, and consuls abroad, attends to all matters of extradition, has charge of international tariff relations, issues passports, makes arrangements for international conferences and congresses, gathers information about conditions abroad and places it at the disposal of the president, of Congress, or, if suitable, of the public; and, in general, stands ready to take up any task, in peace or war, which the protection or promotion of American interests beyond our borders entails.

Officers of the department

Although in no proper sense a premier, the Secretary of State enjoys a certain priority among the department heads. His is the

[1] See p. 276.

oldest department; its work is of an exceptionally critical nature; his relation with the president is peculiarly confidential; except at times when the president chooses, in effect, to be his own secretary of state (as did President Wilson during much of the recent war period), he is the most conspicuous cabinet officer; and the roster of incumbents of the position since 1789 has contained enough great names—Jefferson, John Quincy Adams, Clay, Webster, Seward, Blaine, Hay, Root, Hughes—to have invested the secretaryship, like the presidency itself, with a lofty tradition.[1] The department has the smallest staff of any of the ten, and of course a large proportion of the members are stationed in foreign countries. None the less, the organization in Washington is elaborate, if not intricate. Next in rank to the department head is the under-secretary of state, known until 1919 as the counselor of the State Department. Then come three assistant secretaries, a chief clerk, a solicitor (who handles claims and other matters of a strictly legal nature), and five assistant solicitors, an adviser for foreign trade, and an adviser for commercial treaties. Seven bureaus (accounts, appointments, citizenship, consular, diplomatic, indexes and archives, and rolls and library) and five divisions (Far Eastern affairs, Latin American affairs, Near Eastern affairs, Western European affairs, and Mexican affairs), each presided over by a chief, complete the more important parts of the machinery.[2]

Diplomatic service

The department carries on its work abroad through two separate arms, the diplomatic service and the consular service. The diplomatic service provides means through which the government keeps informed on political affairs in foreign countries, presents claims to and carries on discussions with foreign governments, acts for the protection of American citizens, and obtains international concessions and agreements. The consular service performs a multitude of duties, chief among which are observing and reporting trade and industrial conditions, assisting in the execution of immigration and tariff laws, aiding American travelers, and, in certain Asiatic countries, exercising civil and criminal jurisdiction in cases in which American citizens are involved. The diplomatic service consists of some four hundred and fifty officials.

[1] J. M. Mathews, *The Conduct of American Foreign Relations*, 41-42.

[2] The best account of the history and organization of the State Department is G. Hunt, *The Department of State of the United States* (New Haven, 1914). A good brief description is Mathews, *Conduct of American Foreign Relations*, Chap. III. Cf. W. Lippman, "For a Department of State," *New Repub.* (Sept. 17, 1919); A. Sweetser, "Why the State Department Should be Reorganized," *World's Work*, XXXIX, 511-515 (Mar., 1920).

Thirteen, of the highest rank, are ambassadors to important countries; thirty-one are ministers plenipotentiary;[1] somewhat over a hundred are secretaries of legation; and the remainder are commercial, military, naval, or general *attachés,* counselors, and, at the bottom of the scale, student interpreters. Formerly, appointments to all grades of the service were made by the president and Senate with no necessary regard for considerations of fitness, and the offices were often bestowed as rewards for party service. This is still true of the positions of ambassador and minister; and inasmuch as the salaries paid these principal representatives of the country abroad cover, in most cases, only a small part of their necessary expenses, the appointees are practically limited to men of independent means as well as of satisfactory party standing. European nations pay their diplomats well, give them reasonable assurance of promotion, and hence offer to young men a chance for a real career in the service. We have never done this, and we must not wonder that, notwithstanding several notable exceptions, our diplomatic service ranks low in ability, experience, and technical knowledge. A good beginning toward reform was made in 1909, when President Taft instituted a system of competitive examinations for the lower grades of the service, with provision for efficiency records as a basis of promotion from one grade of secretaryship to another. But this does not affect the members of the service above the rank of secretary, who, therefore, seldom long outlast the administration that appointed them, and practically never survive a change of the party in power.[2] In the consular service the situation is better, because, whereas political appointments formerly prevailed there also, President Cleveland started a reform as early as 1895 and President Roosevelt introduced, in 1906, a plan of competitive examinations and efficiency ratings under which consuls of all grades, including consuls-general, are appointed and promoted on a basis of merit. In both services, however, the new arrangements rest only on executive orders and have been partially ignored when party changes took place.

Consular service

The consular service naturally covers the earth more completely than does the diplomatic service. In 1914—before the fluctuations

[1] The number varies, and is about to be increased somewhat by the restoration of full diplomatic relations with Germany and her allies of the war period.

[2] Diplomatic service in general is described in J. W. Foster, *The Practice of Diplomacy* (Boston, 1906), Chaps. I-X; the diplomatic service of the United States, in Mathews, *Conduct of American Foreign Relations,* Chaps. IV-V.

CHAP. XXII

incident to the World War began—it comprised five consuls-general at large, who were advisory and inspecting officers; fifty-seven consuls-general, who, in addition to the functions of consul, supervise the consuls and consular agencies in their districts; two hundred and forty-one consuls, divided into nine classes according to salary; three hundred and fifty-seven vice-consuls, who act for consuls in places in which the latter cannot personally attend to business; two hundred and thirty-seven consular agents; and interpreters and other minor officials—a total, for the service, of over a thousand persons.[1] Since 1915 consuls and consuls-general have been appointed by the president and Senate to grades, not to posts; they are subsequently assigned to particular posts and moved from one post to another, within the same grade, by the president alone. The consular service stands much higher in foreign estimation than the diplomatic service; indeed, although much criticized at home, it is considered abroad to be the equal of any in existence.[2]

2. Treasury Department

Under the Articles of Confederation such limited financial administration as fell within the province of the national government was taken care of by a superintendent of finance, succeeded in 1784 by a treasury board. The vast volume of fiscal business destined to arise out of the financial powers (especially the power to tax) conferred in the constitution on the new government set up in 1789 was not, of course, foreseen. Nevertheless, one of the first necessities was machinery for the collection of taxes, the custody of funds, and the keeping of accounts; and the next important agency established by Congress after the Department of State became the Department of the Treasury. As has been pointed out elsewhere, the organic statute creating this department does not use the term "executive"; it requires the head of the department to report directly to Congress; and hence on its face it sets up a presumption against control of the department by the president. But we have also seen that Jackson claimed and exercised a directing voice in the work of this department no less than of the others, and that from his day onwards there has been no real difference of status.[3] With the aid of his power of appoint-

[1] McLaughlin and Hart, *Cyclopedia of American Government*, I, 449. The results of a thorough investigation of the diplomatic and consular services by a special committee of the National Civil Service Reform League in 1918-19 are set forth in *Report on the Foreign Service* (New York, 1919).

[2] On the consular service see Mathews, *Conduct of American Foreign Relations*, Chap. VI; Foster, *Practice of Diplomacy*, Chap. XI.

[3] See p. 260.

ment and removal, the president can as readily control policy here as elsewhere.

Financial functions:

Starting as a small organization, with fairly homogeneous financial functions, the Treasury Department has developed into a huge administrative establishment, employing more people than any other except the Post-office Department,[1] and performing tasks, great and small, of amazingly varied character. Its work falls into two general divisions, one financial and the other non-financial.

(a) Collection of revenue

The first important financial activity is the collection of the national revenue. The principal sources of revenue and their yield will be explained in a later chapter.[2] Suffice it to say here that practically all income of the national government, except from the postal service, is gathered by two great branches of the Treasury Department, namely, the customs service and the internal revenue service. The one is directed ordinarily by one of the five assistant secretaries in the department; the other by a commissioner of internal revenue, to whom has lately been given the additional task of enforcing the national prohibition laws. A second main financial function of the department is keeping the government's money and paying its bills in accordance with appropriations duly made.

(b) Custody of funds

There is a treasury (in the physical sense) in Washington, in whose vaults large sums are held; and until 1921 there were sub-treasuries in nine other principal cities. Government money has also long been placed in banks, and since the discontinuance of the sub-treasuries most of it is so deposited, principally in the federal reserve banks located in twelve cities carefully chosen with reference to the needs of business.[3]

(c) Control of the currency

A third important financial function is the control of the currency. The bureau of engraving and printing prepares all the paper money, as well as the bonds and other securities, of the national government; the bureau of the mint supervises the mints, where the coined money is produced, and the assay offices; the bureau of secret service guards the currency against counterfeiting; the comptroller of the currency supervises the national

[1] The country's participation in the World War imposed on the Treasury Department tremendous burdens, entailing notable increases of personnel. In April, 1917, the department's employees in Washington numbered about eight thousand and outside of Washington approximately thirty thousand. By 1919 the number in Washington rose beyond thirty-five thousand and outside of Washington to upwards of forty-five thousand. Considerable reductions have since taken place, but it is unlikely that the figures will ever fall to pre-war levels.

[2] Chap. XXVII.

[3] See p. 428.

CHAP. XXII

banks, directs the periodic examinations of them and receives their reports, and prepares and issues the national bank circulation. Finally, the Treasury Department prepares for the president the annual budget, and thus exercises some effective control over fiscal policy. Formerly the department had no definite functions at this point comparable with the functions of the English Treasury or the ministry of finance in leading continental countries, and on this account our system was, as is explained elsewhere, notably defective. But a Budget and Accounting Act of 1921 set up a bureau of the budget in the Treasury Department and required it to make up, every year, on the basis of estimates received from the departments, a budget for the ensuing fiscal year. The first budget thus prepared (for the fiscal year ending June 30, 1923) was presented to Congress by President Harding in December, 1921.[1]

(d) Preparation of the budget

Non-financial functions

Early in its history the Treasury Department began to be assigned functions which had little or nothing to do with finance, and for a long time it was a sort of dumping ground for offices and activities which Congress did not know how otherwise to dispose of. Until 1829 it supervised the postal service; from 1812 to 1849 it contained the general land office; and several duties pertaining to commerce were imposed on it until, in 1903, the Department of Commerce and Labor was created. Even yet, its activities are more varied than those of any other department. The bureau of war risk insurance administers the system of government insurance for soldiers and sailors and the allotments and allowances to their dependents. The bureau of public health frames and enforces regulations for the prevention of the introduction and spread of contagious diseases, supervises the national quarantine service, and carries on scientific research in public health and hygiene. The supervising architect superintends the construction and repair of public buildings. The coast guard renders assistance to vessels in distress and destroys or removes wrecks, derelicts, and other floating dangers to navigation.[2] Occasional recommendations of the head of the department that some of these miscellaneous activities be provided for elsewhere have not yielded

[1] See p. 423. The act of 1921 abolished the hitherto important offices of comptroller and assistant comptroller of the treasury, withdrew the six auditors from the department, and provided for an independent audit of government accounts under a general accounting office, presided over by a comptroller-general and independent of all of the executive departments.

[2] The Federal Farm Loan Board (see p. 429) is also in this department. On the Treasury Department see Reinsch, *Readings on American Federal Government*, 363-377; J. A. Fairlie, *Nat'l Administration in the United States*, 92-132.

results,[1] although at the time of writing (1922) the matter is being freshly considered.

3. War Department

In the order of their establishment, the next two departments are those having to do with the fighting services, *i.e.*, the War Department and the Navy Department. The War Department dates from 1789.[2] Its principal function is, of course, the management of affairs pertaining to the army. Through various bureaus it sees to the enlistment and equipment of men for all branches of the service, provides munitions, contracts for supplies, transports troops, erects and mans coast defenses and other fortifications, supervises the militia, protects the health of the soldiers, and directs the training of young men at the Military Academy at West Point. The department is organized in five divisions and eleven military bureaus; although changes are frequent, especially in time of war. The Secretary of War, it is interesting to note, is commonly a civilian, as in England but not in continental countries. He is selected as a general administrator, not as an expert on military affairs; and for guidance in the technical work of the department he is supposed to rely on the military officers in the various bureaus, and especially on the General Staff, created in 1903 to prepare plans for national defense, and for the mobilization of the troops, to suggest improvements in the military establishment, and to give professional advice to the Secretary of War and to the president as commander-in-chief.

Public works and insular affairs

Until 1798 the War Department administered naval affairs, and until 1849 Indian affairs; and it has today two important functions of a non-military character, *i.e.*, the construction of public works and the administration of the insular possessions. Under a chief engineer, the corps of engineers dredges and improves rivers and harbors, builds dams and reservoirs required in the reclamation of arid lands, and carries out any other engineering projects which Congress authorizes, the most notable as yet being the building of the Panama Canal. All navigable waters of the United States are under the War Department's jurisdiction, and no bridge, pier, or other possible obstruction to navigation can be erected until the department's consent has been obtained. European nations which possess outlying dependencies invariably have a ministry of colonies. The United States, however, has

[1] *Annual Report of the Secretary of the Treasury* (1920), 247-249.

[2] There was a similar department during the period of the Confederation, and Washington reappointed its head, General Henry Knox, head of the new department under the constitution.

never established such a department, and the administration of territorial, or colonial, affairs has been variously assigned to the departments of State, War, Navy, and Interior. At present, Alaska and Hawaii are supervised by the Department of the Interior; the Philippines, Porto Rico, and the Panama Canal Zone, by the War Department; and a few minor possessions by the Navy Department. The bureau of insular affairs was organized in the War Department in 1898 to take charge of matters of civil government in the islands acquired from Spain;[1] and nowadays it receives the reports of the governors and other authorities, audits the insular accounts, purchases and transports supplies for the insular governments, and has charge of appointments in the United States to the Philippine civil service.[2]

4. Navy Department

The Navy Department was created in 1798, at the time of the threatened war with France. Unlike most other departments, it has always had but one important function and, accordingly, an unusually unified, symmetrical organization. Its various activities —the construction and upkeep of war craft, the enlistment of men, the manufacture or purchase of arms and equipment, the making of contracts for supplies, the organization and movement of the fleets, the control of naval hospitals and hospital ships, and other work connected with keeping the fighting forces on sea at their maximum efficiency—are carried on through about a dozen coördinate bureaus; and the department head, being, as in the case of the Secretary of War, a civilian, is advised by a General Board consisting of important naval officers, and by certain other more specialized boards. An important subsidiary is the marine corps, a specially organized body held in readiness to be despatched, in detachments, at any time to any part of the world where Americans are to be protected, disorders suppressed, or patrol duties performed. Portions of this force have been used repeatedly in recent years in the Caribbean countries and in the Far East; while in the World War the corps, recruited to a strength of almost eighty thousand, rendered valiant service. Not altogether illogically, the Navy Department has the administration of Tutuila (in Samoa), Guam, and the Virgin Islands, whose importance consists chiefly in their serviceableness as naval stations. Finally, the

[1] This bureau was at first known as the division of customs and insular affairs. It became the division of insular affairs in 1900 and the bureau of insular affairs in 1902.

[2] H. B. Learned, *The President's Cabinet*, Chap. VIII.

department has charge of the Naval Academy at Annapolis and the Naval War College at Newport.

5. Department of Justice

Following English and colonial precedent, Congress provided in the Judiciary Act of 1789 for an attorney-general who should advise the government on legal matters and represent it in judicial proceedings. This officer was not expected to give all of his time to the work, and he was not made the head of a department, although as soon as the cabinet developed he was received into the group. With the growth of the country and of the government's activities, the duties of the position naturally increased. Solicitors and other assistants were provided for; the attorney-general gave up all private practice; and at last, in 1870, under pressure of the great volume of legal work flowing from the Civil War and reconstruction activities, Congress belatedly established a Department of Justice in which the government's legal business was for the first time brought together and systematized. In number of officers and employees the Department of Justice is smaller today than any other. But it performs exceedingly important functions, and no department, except perhaps the Treasury, is so interlocked with the others. The principal officers in Washington are the Attorney-General, who gives his time mainly to studying and rendering opinions on legal questions referred to him by the president or heads of departments; a solicitor-general, who represents the United States before the courts; an assistant to the Attorney-General, who has special charge of cases arising out of the national anti-trust and interstate commerce laws; seven assistant attorneys-general, with such duties as are assigned to them by the head of the department; and a director of the bureau of investigation, whose activities parallel and supplement those of the secret service in the Treasury.

Officers in Washington

Outside of Washington the department has a district attorney and a marshal in each of the eighty-two judicial districts into which the country is divided, besides others in Alaska, Porto Rico, and the Panama Canal Zone. Both offices date from 1789. The attorneys represent the United States in suits brought in the district courts to which the United States is a party and prosecute violators of national laws; the marshals serve writs, summon jurors, protect judges against violence, and execute court orders and decisions. All are appointed by the president and Senate for a term of four years. There are assistant attorneys and deputy

Field force

CHAP. XXII

marshals, and private legal aid is sometimes employed. The work of this field force of the department is, of course, supervised from Washington, and rather more closely, in the nature of things, than the outlying services in some other departments.[1]

Functions

Two main duties fall to the officials of this department. The first is to give opinions to the president and the other principal officers of the government on questions touching their duties and involving construction of the constitution or the laws. The courts will answer such questions only in deciding actual cases and cannot be looked to for immediate rulings on the constitutional and legal matters that come up almost daily in the carrying on of the government's work. For these the officials concerned are dependent upon the Attorney-General and his principal assistants at the national capital. In many instances the opinions rendered are final and conclusive, and hence determine the law; and sometimes they profoundly influence the political, as distinguished from the purely legal, policies of the government. Opinions are published, after the manner of judicial decisions, and they acquire weight as precedents in a similar way. They are not furnished to Congress or its committees, but only to the executive; nor are mere departmental regulations thus construed, or abstract or hypothetical questions answered.

The second main duty of the department is to supervise or conduct suits to which the United States is a party and to prosecute offenders against the revenue, currency, commerce, banking, postal, and other national laws. Suits begun by the government are brought before a district court or the Supreme Court, according to the nature of the case; and while suits against the government are not allowed as a matter of right, they are in fact permitted and are instituted in a district court or in the special Court of Claims. In the lower courts the government, whether plaintiff or defendant, is commonly represented by the district attorney of the district in which the action is begun; in the Supreme Court and Court of Claims, by the Attorney-General or one of his principal assistants, usually the solicitor-general, or, in trust cases, the assistant to the Attorney-General. Two minor, though not unimportant, functions of the department are the advising of the

[1] It should be emphasized that the Department of Justice and the judiciary are quite separate. The former has nothing to do, legally, with the creation of courts, the appointment or removal of judges, or the regulation of judicial procedure.

president on requests for pardons[1] and the administration of the federal penitentiaries at Atlanta and Leavenworth and of the jail and reform schools in the District of Columbia.[2]

6. Post-office Department

In England the postal system is regarded as a revenue producing enterprise and is administered, to all intents and purposes, as a branch of the Treasury. Similarly in the United States the post-office, as inherited from colonial times, was considered a part of the Treasury Department until 1829. But in that year the Postmaster-General was admitted to the cabinet, and thenceforth the establishment over which he presided was considered a distinct department.[3] Furthermore, it entirely ceased to be regarded (if, indeed, it was ever so thought of) as a source of national revenue. The most that was attempted was to make it pay its way, and during long stretches of time—indeed, almost continuously between 1830 and 1910—it failed to do even that.[4] Only when the United States entered the World War, in 1917, were postal rates deliberately pushed up to such a level as to yield the government a clear profit; and they were lowered again, in 1919, as soon as the emergency passed. Some of the landmarks in the development of the service are the introduction of the registration system in 1855, the beginning of urban free delivery service in 1863, the establishment of the money order system in 1864, the beginning of rural free delivery service in 1896, the introduction of the postal savings system in 1910, and the starting of the parcel post system in 1912.

Organization and extent of the postal service

Today the Post-office Department of the United States is by far the largest postal establishment in the world. With its 288,000 employees, it is also decidedly the largest of our ten departments, and by the nature of its work it is the one whose operations come closest home to the great mass of the people. It is administered by a Postmaster-General, who, not unnaturally, is frequently selected with a view to his experience in managing a great business,

[1] See p. 273.

[2] On the attorney-generalship see H. B. Learned, *The President's Cabinet*, Chap. VII, and on the Department of Justice in general, J. A. Fairlie, *National Administration in the United States*, Chap. XI.

[3] Like the Secretary of the Treasury, the Postmaster-General reports directly to Congress.

[4] Apart from all considerations of possible mismanagement at times, there are many reasons why this should have been so: the practical necessity of extending the service over large regions where the returns were small; the size of the country, entailing enormous transportation costs; and the dead loss involved in handling vast quantities of government and "franked" matter.

CHAP. XXII

e.g., John Wanamaker, or, at all events, conducting large enterprises, not excluding, as in the case of Will H. Hayes, national political campaigns. Each of four assistant postmasters-general has charge of a branch of the department, which in turn is organized in divisions under superintendents or chiefs; and there are other general departmental officers, including the usual chief clerk, a solicitor, and five assistant attorneys. The bulk of the department's work is done, of course, throughout the country, in collecting, assorting, transporting, and delivering mail (including parcels of merchandise), receiving and caring for savings, transferring money under the money order system, and enforcing the laws against lottery schemes and swindlers. Extension of rural delivery service to large parts of the country has made possible the abandonment of many thousands of small post-offices. Nevertheless, the number on June 30, 1921, was 52,168.[1] These are divided into four classes, according to annual receipts, the fourth class including all whose receipts are under $1500, or about four-fifths of the total number. As has been pointed out, all fourth-class postmasters, together with the great body of lesser employees of other types, are now included in the classified service. Postmasters of the other three classes, however, are still appointed by the president and Senate, with no restriction on political appointments except such as the president chooses to be bound by when sending nominations to the Senate.[2]

7. Interior Department

Instead of establishing a home, or interior, department in 1789, as was several times proposed, Congress turned over such duties as would have been appropriate to it to the Department of Foreign Affairs, which, as we have seen, was thereupon rechristened the Department of State; and other such functions were subsequently assigned, with no particular logic, to the Treasury Department and the War Department. In the course of a generation the expansion of the country and the growth of governmental activities made a new department highly desirable. Madison advocated in 1816 that an additional department be created, and a bill for the purpose was considered, though without result, in 1817. John Quincy Adams and Andrew Jackson managed to agree in supporting the plan. It was only in 1849, however, that the necessary legislation could be procured; and even then Calhoun and other southern men

[1] The maximum number, reached in 1901, was 76,945.

[2] See p. 307. On the office of postmaster-general see Learned, *The President's Cabinet*, Chap. IX. An excellent account of the department's organization and work is D. C. Roper, *The United States Post Office* (New York, 1917).

strongly opposed the step on the ground that it would increase the tendency of the national government to encroach on the powers held to be reserved to the states.[1]

Functions

In European countries, notably France, the ministry of the interior is charged mainly with the supervision of local government and administration. In the United States this function falls to the several state governments, and the national Interior Department takes care, rather, of a varied assortment of interests and activities which have little or no relation to state or local organization. Four main administrative agencies were transferred to the department when it was established, *i.e.*, the patent office from the State Department, the general land office from the Treasury Department, the pension office and office of Indian affairs from the War Department. A bureau of education was added in 1869, the geological survey in 1879, the reclamation service in 1902, the bureau of mines in 1910; and there are some other miscellaneous activities, including supervision of the territorial governments of Alaska and Hawaii and the administration of the national parks and monuments. There have been some withdrawals, but not many; for example, the recording of copyrights was given over to the librarian of Congress in 1870, after having been attended to in the Interior Department for eleven years. Each of the eight principal branches named is in charge of a commissioner or a director, appointed by the president and Senate.

Patent administration

Space will permit farther mention of only three or four of the department's activities. Authorized by the constitution to make laws "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"[2] Congress passed the first patent act in 1790. Machinery for administering the law was gradually built up in the State Department, but was transferred, as we have seen, in 1849. Patents are issued upon application of the inventors if, after careful scrutiny, the device or process is judged by the expert examiners of the patent office to be novel and useful; and the exclusive right of manufacture, use, or control runs for a period of seventeen years, with the possibility, in some cases, of renewal. More than a third of the three million patents issued in the civilized world have been

[1] The origins of the Department of the Interior are fully described in H. B. Learned, *The President's Cabinet*, Chap. x.

[2] Art. I, § 8, cl. 8.

CHAP. XXII

granted in the patent office of the United States, and of these over half have been granted since 1895.

Public land administration

The administration of public lands has always been one of the government's largest tasks. Most of the territory of the United States, outside of the thirteen original states and the insular possessions, has been, at one time or another, public land (a total of 2,925,000 square miles), and the amount remaining in the government's care in 1918 was more than six hundred million acres.[1] Vast quantities were in earlier times granted to states in aid of education and internal improvements and to trans-continental railroads; much was allotted to soldiers and sailors; a great deal has been sold, either to corporations and individual speculators or to settlers under the easy terms of a homestead act of 1863. Prodigality prevailed in earlier days, and many species of fraud were practised. Of late, however, this fast disappearing resource has been better husbanded. On the basis of careful surveys, the land is now classified as mineral, timber, grazing, or agricultural; much legislation controls the acquisition of mineral land and land affording water-power sites; and every effort is made to favor the bona fide home-seeker as against the mere speculator. Under the direction of a general land office at Washington, about a hundred local land offices, each in charge of a register and a receiver, are prepared to consider claims, issue land patents, and transact other public land business. Sales of all kinds proceed at the rate of ten or fifteen million acres a year.

Other services

The reclamation service, established in 1902, is charged with the construction of irrigation works in arid and semi-arid regions, thus helping private and state enterprise to make available for farmers the hundreds of thousands of acres of dry lands in the western states. The reclaimed lands are sold to settlers on an instalment plan; and more than a million acres were put on the market up to 1918.[2] The geological survey studies and reports on the topography, geology, and water and mineral resources of the country and classifies the public lands. The bureau of mines investigates methods of mining, mine accidents and the means of preventing them, and the treatment and utilization of ores, and seeks to bring about both safer and more healthful conditions

[1] In the United States proper, 222,448,225 acres, and in Alaska 378,165,760 acres.

[2] F. A. Ogg, *National Progress, 1907-1917*, 107-112.

among workers in the mineral industries and increased efficiency in the use of the country's mineral resources. The pension office examines pension claims, keeps pension records, and attends to the payment of pensions, in accordance with both general law and a vast number of special enactments, and also administers retiring allowances in the civil service.[1] The Indian office manages affairs on the Indian reservations, and looks after Indian education and landed interests. The bureau of education gathers statistics, makes surveys, prepares reports, issues digests of school laws, organizes conferences, and offers recommendations for the improvement of educational facilities and methods, but has practically no administrative duties except in the management of the education of native children in Alaska and the handling of certain funds for the use of colleges of agriculture and the mechanic arts.[2]

Expansion of governmental activities

All of the departments thus far mentioned have had to do, in their original form at all events, with matters either of a strictly governmental character or customarily left to governmental supervision—the conduct of foreign relations, the collection and disbursement of revenue, the administration of the army and navy, the operation of a post-office, the granting of patents, the custody and sale of public lands, and what not. Continued expansion of legislative and other public activities eventually led, however, to demands for bureaus and departments in fields lying quite outside the necessary functions of government. Some people argued that such extensions were not warranted by the constitution. Others opposed them on grounds of economy. But they have gone forward beyond all earlier expectations, and, in addition to sundry isolated administrative agencies, have added to the seven older departments the three more recent ones of Agriculture, Commerce, and Labor.

8. Department of Agriculture

The Department of Agriculture began as a detached bureau[3] in 1862 and acquired its present status, with a representative in the cabinet, in 1889.[4] Even at the last-mentioned date, its work was of a widely varied and undoubtedly useful character. But during the past thirty years it has taken on new tasks until nowadays it is by all odds the greatest governmental establishment

[1] See p. 309.

[2] H. B. Learned, "The Educational Function of the National Government," *Amer. Polit. Sci. Rev.*, XV, 335-349 (Aug., 1921).

[3] It was called a department, but did not actually rank as such.

[4] Learned, *The President's Cabinet*, Chap. XI.

CHAP. XXII

of its kind, in scope of activities and in number of employees, in the world. Not fewer than thirteen or fourteen main bureaus or services are included in it. Some, *e.g.*, the bureaus of animal industry, plant industry, chemistry, soils, and entomology, are engaged primarily in scientific work—investigating, experimenting, and studying, with a view to disseminating information that will be useful in the growing of crops, the breeding of live stock, and related occupations. Others, *e.g.*, the bureaus of crop estimates, markets, and farm management, are concerned with supplying the farmer with crop reports and forecasts, showing him how to market his products to the greatest advantage, and encouraging him to introduce improved forms of farm practice; indeed the most notable development of the department's work in recent years has been in the promotion of agriculture on its economic, as distinguished from its scientific, side. The bureau of public roads and rural engineering investigates road materials, road construction, and road maintenance, and also irrigation and drainage questions. The states relations service aids the head of the department in promoting and supervising agricultural education, which is carried on, in various forms, in conjunction with the states. The forest service takes care of the hundred and fifty national forests, investigates forestry problems, and shares responsibility with the land office and the reclamation service in the Department of the Interior for carrying out and extending the conservation program gradually developed since 1900. Finally, the well-known weather bureau, with the aid of its numerous stations throughout the country, conducts meteorological inquiries and forecasts weather conditions, for the benefit alike of agriculture, commerce, and navigation.[1]

Demand for commerce and labor departments

The movement for a department of agriculture prompted similar agitation by commercial interests and organized labor. A bureau of labor, organized in the Interior Department in 1884, became, four years afterwards, a so-called department of labor. But only in 1903 was a full-fledged department set up; and then only in conjunction with commerce. The main interest was, indeed, in a department of commerce, which President Roosevelt urged upon Congress as a national necessity in view of the difficult problems arising from the growth of big business in the opening years of the century. The bill creating a department of commerce and labor was opposed by labor organizations, which demanded a

[1] J. A. Fairlie, *National Administration in the United States*, Chap. xv.

separate and coördinate labor department. It, however, became law (1903);[1] and only in 1913, in the closing days of the Taft administration, was the separation which labor wanted finally brought about. Since the last-mentioned date there have been distinct commerce and labor departments.

9. Department of Commerce

The combined department as organized in 1903 represented, in the main, a consolidation of offices and services transferred from the State, Treasury, and Interior departments, together with the hitherto independent "department" of labor; only two new bureaus appeared, *i.e.*, manufactures and corporations, and both of these have now dropped out. As at present constituted, the Department of Commerce contains eight bureaus and services. The bureau of foreign and domestic commerce collects and publishes commercial statistics and investigates matters affecting the commercial development of the country, thereby supplementing the activities of the consular service. The bureau of standards carries on research in fields in which precise measurements are required, and compares and tests standards of measurement employed in scientific investigation, commerce, and educational institutions with the standards adopted or recognized by the government. The bureau of lighthouses, the steamboat inspection service, the bureau of fisheries, the bureau of navigation, and the coast and geodetic survey have functions sufficiently indicated by their respective names. Finally, the bureau of the census is charged with taking the decennial census required by the constitution, and also the various supplementary enumerations provided for by statute. Until twenty years ago, decennial censuses were taken by a staff specially constituted in each instance for the purpose, and when the work was completed the machinery was dismantled, to be set up entirely anew at the next census period. A permanent census office, under a director, was, however, established in 1902, partly with a view to developing an experienced staff, but mainly in order to enable the work to be done more deliberately by being carried on, in one phase or another, practically all of the time. The range of census inquiries has increased greatly, and the published reports have grown proportionately voluminous. Whether consulted in their fuller form or in the form of the convenient "Abstract" published decennially, these reports give a compre-

[1] Learned, *The President's Cabinet*, Chap. XII; F. Emory, "The New Department of Commerce and Labor," *World's Work*, V, 3334-3337 (Apr., 1903).

CHAP. XXII

hensive and illuminating view of the population, occupations, wealth, and activities of the country.[1]

10. Department of Labor

Starting with only three bureaus in 1913, the Department of Labor has come, as a result of internal reorganization and of functional expansion, to contain nine variously organized bureaus, divisions, and services. The work of two of these branches, *i.e.*, the bureaus of immigration and naturalization, is spoken of elsewhere;[2] that of the others is indicated, in a general way, by the bureau or divisional titles: publication and supplies, labor statistics, employment service, industrial housing and transportation, conciliation, children's bureau, and women's bureau. The children's bureau, created in 1912 to investigate and report upon "all matters pertaining to the welfare of children and child life among all classes of our people," has thus far given attention mainly to problems of child hygiene and child employment in industry. The women's bureau, dating from 1920, is required to "formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment."

Movement for executive reorganization

One need not be surprised to be told that in this vast mechanism of executive and administrative agencies there is a good deal of illogical grouping, duplication, and confusion, with resulting waste of effort and of money. Some parts of the system have been designed to meet definite administrative needs and have been carefully correlated with other preëxisting arrangements. But in many cases public demand—or at all events the demand of an influential group or interest—has led to the establishment of a new bureau or service, or even of an entire department (*e.g.*, Agriculture and Labor), without much reference to its relations with other parts of the governmental machinery; too often a new bureau or division has been simply tacked on at whatever point seemed at the moment convenient. Altogether, more than two hundred bureaus and divisions came into existence.

President Taft was strongly of the opinion that great improvements could be made, and accordingly he secured from Congress

[1] W. R. Merriam, "The Evolution of American Census-taking," *Century Mag.*, XLIII, 831-842 (April, 1903); J. Cummings, "The Permanent Census Bureau; a Decade of Work," *Amer. Statist. Assoc. Pub.*, XIII, 605-638 (Dec., 1913); W. F. Wilcox, "Development of the American Census Office since 1890," *Polit. Sci. Quar.*, XXIX, 438-459 (Sept., 1914).

[2] See pp. 187, 441.

in 1910 an appropriation for an investigation. An able commission on economy and efficiency was created, and by far the most comprehensive and systematic study of the executive branch of the government ever undertaken was carried out, under five main heads: problems of a national budget, problems of organization, problems of personnel, problems of financial procedure, and problems of business practice and procedure. A report fully describing the existing organization of the executive branch was published in 1911;[1] a series of monographs descriptive of several of the government services was prepared; and many concrete recommendations for the abolition of certain services and the consolidation of others were offered. For example, it was urged that three or four existing services having to do with public health, yet located in as many different departments, be united in a single independent health service. Unfortunately, no action was taken. The commission was abolished in 1913 through the failure of Congress to make provision for its support; a change of the party in power turned government activities into different channels; and the subsequent participation of the country in the World War thrust the matter completely into the background.[2]

Congressional joint committee on reorganization (1921)

After peace was restored, however, the project was revived. The enormous multiplication of governmental agencies in the war period compelled considerable readjustments and retrenchments and gave fresh emphasis to the need of a general reorganization. Certain of the states, notably Illinois, were actively carrying out highly advantageous administrative reforms.[3] And bills began to appear in Congress providing for the conversion of the Department of the Interior into a department of public works and for the creation of departments of education, public welfare, conservation, public health, and even highways and aeronautics. President Harding was deeply interested, and the upshot was the creation, in 1921, of a congressional joint committee (of six members) on reorganization.[4] At the date of writing (1922) this committee is

[1] "Outline of Organization of the United States Government, July 1, 1911," transmitted to Congress by the president January 17, 1912 (62nd Cong., 2nd Sess., House Doc. No. 458).

[2] G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (New York, 1919), 84-94.

[3] W. F. Dodd, "State Reorganizations and the Federal Problem," *Acad. Polit. Sci. Proceedings*, IX, 142-151 (1921).

[4] On authorization of Congress, the President appointed as a seventh member, representing the executive, Mr. W. F. Brown, of Toledo, who was made chairman of the committee; and to him was given the task of working out a program that would have the approval of the President and the cabinet.

working on an elaborate report which is expected to propose, among other considerable changes, the consolidation of the war and navy departments into a single department of national defense, similar consolidation of the departments of commerce and labor (on the lines of the joint department of 1903-13), and the creation of a department of public welfare in which will be placed such agencies as the consolidated public health service, the women's and children's bureaus, the pension bureau, the bureau of education, and the bureau of Indian affairs—all at present attached in illogical fashion to departments which are mainly concerned with other things. The number and variety of government functions and services is much too great to permit of any grouping which will be wholly logical, symmetrical, and free from duplication; and it does not follow that such an arrangement, if it were possible, would be cheapest and best. No one doubts, however, that far-reaching improvements can be made in the present machinery, or that now is an exceptionally favorable time to make them. Hence the country is justified in looking for important results from the present effort.[1]

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[1] The main obstacle is the opposition of various bureau chiefs and other officers who would be affected personally, or whose branches of the service would be affected, by the proposed changes. It is still possible that this will frustrate the entire effort. J. T. Pratt, "A Proposal for Government Reorganization," *Acad. Polit. Sci. Proceedings*, IX, 17-30 (1921). Several other papers on phases of the subject appear in this volume. Cf. National Budget Committee, *Proposal for Government Reorganization* (2nd ed., New York, 1921). For a popular discussion see H. James, "Remaking the Federal Administration," *Rev. of Revs.*, LXIV, 171-176 (Aug., 1921).

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CHAPTER XXIII

THE STRUCTURE OF CONGRESS

Importance of Congress

"Congress," writes a former distinguished member of that body, "is the law-making department of the government, and this function, in a government which is theoretically one of law, entitles it to preëminence under our system. It is the established organ by which the people are supposed to declare the policies that are to govern them."[1] The two houses do not, of course, form such a sovereign, omnipotent assembly as is the British Parliament. Their powers, taken as a group, are distinctly inferior to those of the parliaments of France, Italy, Canada, and many other countries. Congress is strictly bound by the constitution, which it has no power to amend; it cannot appoint or fully control the executive; it is hedged about by the reserved authority of forty-eight state legislatures, whose functions are just as well based as its own and cannot be invaded by it. Nevertheless, whatever legislative power the nation possesses is vested exclusively and permanently in Congress and, as has already appeared, and will be more fully explained below, to its strictly legislative powers are added, largely as a result of the application of the principle of checks and balances, four or five other powers of first-rate practical importance.[2] We now turn to a study of this interesting and imposing part of our governmental system—its structure, organization, procedure, functions, powers, limitations, features of strength and elements of weakness.

Why the bicameral system was adopted

The easiest decision that the framers of the constitution had to make was to provide in their plan for a national congress. For thirteen years the common affairs of the colonies and later states had been managed by such an agency; the constitutional convention was itself held by congressional authority; the first necessity of any republican scheme of government was recognized to be a representative body; and every scheme proposed for the convention's consideration made Congress an indispensable feature. The only doubt,

[1] S. W. McCall, *The Business of Congress*, 3.
[2] See p. 395.

aside from questions of power, was as to whether there should be one house or two, and what, in either case, should be the basis of membership. The decision in favor of the bicameral form was influenced by several considerations. In the first place, practically all precedent, except that of the existing Congress, pointed in that direction. The English Parliament consisted of the House of Commons and the House of Lords. Most of the colonies had had two legislative chambers. All of the new state constitutions except those of Pennsylvania, Georgia, and Vermont provided for a relatively large, popularly chosen lower house and a smaller, more conservative upper house. And, on the whole, the plan had worked well. A second consideration, of a more theoretical nature, was that it was unwise to entrust the large legislative powers that were now to be given the national government to a single chamber—most of all, to one whose members were to be elected by direct popular vote. A more conservative upper house seemed to be needed as a check upon hasty, prejudiced, or otherwise ill-considered legislative actions. Finally, strong practical reasons appeared for creating two houses. The conflict that arose in the convention between the small and large states has been described.[1] It might easily have terminated the deliberations and frustrated all hope of a stronger union. The act that chiefly averted this disaster was, as we have seen, the adoption of the so-called Connecticut compromise, under which the states were to be represented according to numbers in a lower house but on a footing of equality in an upper house; only in the organization of the Senate was a practical way found of not merely saying that the states were equal but giving them an actual equality of power and importance.

The bicameral system useful in the national government

Events have justified the decision. We shall see that in the domain of local government the bicameral principle has little to commend it, for the reason that, in the main, legislative action does not there extend to matters affecting life, liberty, or other fundamental interests and rights. The plan is not followed in English local government, and it is being fast abandoned in our own country, notably in commission-governed cities. Of late, it has been brought into question, too, as applied to our state legislatures. But as applied to Congress it is generally and properly regarded as useful. It entails added expense and sometimes leads to undesirable delay and shifting of responsibility. But it lends stability, checks legislation on mere impulse, ensures the consideration of

[1] See p. 135.

CHAP. XXIII

measures from more varied angles than would otherwise be the case, and, as now operated, imposes no restraints on the influence of public opinion. The kind of representation for which the Senate provides is different from, but hardly less desirable than, the kind provided for by the House.

The House of Representatives

How this comes about will appear if we look into the composition of the two branches. In contrast with both the president and the Senate, the House of Representatives was intended to be an organ of government directly representing the general body of the people; and accordingly the constitution provides that the members shall be elected "by the people of the several states." Under a unitary form of government, such as prevails in England and France, members of the popular branch of the legislature are chosen in accordance with uniform suffrage regulations, which are laid down by national laws. In some federally-organized states, also, this is the case; in the former German empire members of the Reichstag were elected under a single imperial suffrage law, notwithstanding wide differences in the suffrage systems of the states, and the same is true in the present German republic. A different plan, however, prevails in the United States. No uniform national suffrage system has ever been set up here, either by the constitution or by law. The

By whom elected

constitution stipulates only that for purposes of congressional elections "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature;"[1] so that, whoever is entitled under the constitution and laws of any given state to vote for a member of the lower branch of the legislature of that state is *ipso facto* qualified to vote in that state for a member of Congress. Under the Fifteenth Amendment a state may not withhold the right to vote on account of race, color, or previous condition of servitude, and under the Nineteenth, on the ground of sex. But these restrictions are general, and do not apply to congressional elections more than to others. In an earlier chapter we have seen that suffrage regulations vary greatly from state to state.[2] Hence it follows that in some states only citizens can vote for members of Congress, while in others persons who have merely declared their intention to be naturalized can do so; that educational tests are imposed here and taxpaying qualifications there; that periods of residence differ, and also requirements of registration.

[1] Art. I, § 2, cl. 1.

[2] Chap. xv.

Basis of apportionment of members

Although a broadly national, popular body, the House is farther constructed with reference to state lines. Every representative is elected within a given state, and every state has, as such, a definite quota of members. Provisional quotas were assigned in the constitution as originally adopted, to serve until a census could be taken; and thereafter representatives were to be apportioned among the several states "according to their respective numbers," which were to be computed by "adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."[1] The "other persons" referred to were, of course, slaves; and this clause, as has been pointed out, formed one of the important compromises of the constitution.[2] With the abolition of slavery, the three-fifths provision became obsolete, and the constitution now provides simply, in the Fourteenth Amendment, for apportionment among the states "according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." It also provides for a reduction in the representation of any state which withholds voting privileges from adult male citizens of the United States "except for participation in rebellion, or other crime." Many states, as we have seen, are, and have long been, liable to this penalty, though enforcement of it has never been found practicable.[3]

Growth of membership

After the results of a decennial census are known, Congress decides how many members the House of Representatives shall have during the next ten years and allots to each state its share of the total. The apportionment must be made according to population, as just explained, with the qualification that each state is to have at least one representative, regardless of how scant its numbers may be. It is curious to note today that one of the grounds on which the constitution was opposed during the debates on ratification was that the House of Representatives would be too small; one of the papers in the "Federalist" is devoted entirely to an answer to that objection.[4] As a matter of fact, the House long ago reached the point of unwieldiness. Starting with 65 in 1789, the membership rose at once, after the census of 1790, to 103. Following other censuses, it mounted as follows: 1820, 213; 1870, 292; 1880, 325; 1890, 356; 1900, 386; 1910, 435. Every reapportionment in our history

[1] Art. I, § 2, cl. 3.
[2] See p. 207.
[3] See p. 135.
[4] No. LVII (Lodge's ed., 350-355).

CHAP. XXIII

except one [1] has brought a substantial increase. The reasons are not difficult to discover. One is the expansion of the country itself, resulting in the admission of new states, each entitled to a quota of representatives. But more important is the natural reluctance of states to see their quotas of representatives reduced to make room for increased representation of faster growing states. The only way of preventing such reductions from taking place on a considerable scale is to keep the ratio of population to membership relatively low—which, of course, means a substantial increase of members every ten years from rapidly growing states. The membership of the House is still decidedly smaller than that of either the British House of Commons or the French Chamber of Deputies.[2] But it is larger than is consistent with the most expeditious and effective work, and most members agree, as a matter of theory at all events, that its periodic expansion must soon be stopped.

It must not be inferred that a state's quota is never reduced. Had the ratio been so maintained that no state should ever have lost representatives, the House would now be two or three times as large as it is. From a maximum of twenty-three, Virginia's quota dwindled to nine in 1870; and other cases of considerable shrinkage, especially in New England and the South, could be cited. Yet several reapportionments have been carried through without the loss of a seat by any state; and the act of 1911, based on the census of the previous year, was considered a marvel of ingenuity in that it did not diminish the representation of a single state, while yet increasing the total membership of the House by only thirty-six.

How a reapportionment is made

The constitution requires that the number of representatives shall not exceed one for every 30,000 inhabitants. If that ratio were applied today, the House would have more than three thousand members! The ratio actually used in any given reapportionment is determined by dividing the whole population of the country by the number of members, for the ensuing decade, upon which Congress has decided. In 1790 it was 33,000; in 1850, about 93,000; in 1870, about 131,000; in 1890, about 174,000. With a population of approximately 92,000,000, and a total agreed membership of 435, the ratio in 1910 became a little less than 212,000—which manifestly meant that a member represented in the ensuing decade upwards of seven times as many people as a hundred years

[1] In 1843.

[2] Under an act of 1918 the British House of Commons had 707 members, although the Irish settlement of 1921 entailed the withdrawal of about one hundred. The French Chamber of Deputies has 626 members.

before, except in the case of members sitting as the sole representative of states having a population smaller than the quota.[1] The object of the ratio is, of course, to enable the proper allotment of representatives to the several states to be worked out. The ratio is divided into the population of each state in turn, and the quotient is the number sought. Sometimes, however, more or less contentious readjustments have to be made, notably when a major fraction, or even a large minor fraction, remains; and occasionally a state is voted an additional representative outright.[2]

General ticket and district systems

Beyond requiring a direct popular vote, the constitution does not say how representatives shall be chosen in the several states. On the contrary, it enjoins that the time, place, and manner of holding the elections be prescribed in each state by the legislature thereof, subject to the right of Congress to make or alter such regulations.[3] In the earlier days Congress left the states to their own devices, and, naturally, wide differences of usage arose. Thus in some states the representatives were chosen from single-member districts; in others, on a general ticket, as are presidential electors today. As a result of a notable contest in the House in 1839 over the seating of five members elected on the general ticket plan in New Jersey, Congress provided in the reapportionment act of 1842 that thereafter every state entitled to more than one representative should be divided by the legislature into districts composed of contiguous territory and equal in number to the state's quota of representatives, and that each district should be entitled to elect one representative.[4] Subsequent congressional legislation authorizes a state receiving an increase in its quota to keep its districts intact and elect the additional representatives at large, if it desires to do so, or indeed, in case of a decrease, to abandon its districts and elect the entire number at large; and, in accordance with at least the first of these special arrangements, states are sometimes found with one or two congressmen-at-large. But, in general, the district system prevails. Its chief advantage is, of course, that it affords an opportunity for minority representation; and this was the uppermost

[1] Under the apportionment based on the census of 1910 there were four such states: Delaware (pop. 202,322); Nevada (pop. 81,875); Wyoming (pop. 145,965); and Arizona (pop. 204,354), which was admitted in 1912. It may be added that the average representative sits for from four to six times as many people as have been represented in recent years by the average member of the principal European lower chambers.

[2] McLaughlin and Hart, *Cyclopedia of American Government*, I, 56.

[3] Art. I, § 4, cl. 1.

[4] *U. S. Statutes at Large*, V, 491.

CHAP. XXIII

consideration in the minds of the authors of the law of 1842. Under a general ticket system the Republicans would get the entire congressional delegation from a given state if they polled a bare plurality of the state-wide vote. Under the district plan the Democrats will probably capture a few seats by polling a plurality in certain sections of the state in which they are strongest.

Laying out the districts

The district plan has, however, the disadvantage of opening a way for the misuse of power by the legislature for party advantage. After every census, each state whose apportionment of representatives has been altered is, sooner or later, redistricted; and, although national law requires the districts to be composed of "contiguous and compact territory containing as nearly as practicable an equal number of inhabitants," party majorities in the legislatures rarely resist the temptation, when laying out a new set of districts, to arrange boundary lines with a view to capturing the greatest number of congressmen at the ensuing elections. If the Republicans are in control, they will seek to mass the Democratic strength in a few districts, and to distribute their own strength in such a way as to yield small, but reasonably safe, pluralities in a large number of districts. It is both theoretically and practically possible thus to enable a minority of the voters, properly grouped, to return a majority of representatives for the whole state, and by the same token a state's party quotas in Congress can be reversed by a carefully devised redistricting, practically without change in the popular vote.

The gerrymander

This practice is no new thing in our political experience. On the contrary, the name by which it is known, *i.e.*, "the gerrymander," was invented as early as 1811,[1] and the device itself goes back much farther. Nor is it confined to the laying out of congressional districts. Notwithstanding much legislation against it, it is equally common in the division of states into legislative districts and of cities into wards. It results in congressional districts, in the same state, which have two and three times the population of other districts, and in districts of curious and quite indefensible shapes, *e.g.*, the famous "shoestring district" in Mississippi extending almost the length of the state from north to south and constructed to minimize the effect of the negro vote, and the "saddlebag district" in Illinois, composed of two narrowly joined groups of coun-

[1] The gerrymander takes its name from Governor Elbridge Gerry, of Massachusetts, who is reputed to have approved, if indeed he did not inspire, a notorious piece of partisan districting in his state.

ties on opposite sides of the state, and planned expressly to crowd as many Democratic counties as possible into a single district.[1] The custom is a bad one, but it is very difficult to break up. Practically, the districts cannot be made absolutely equal, and it is not feasible to make them as compact as mere physical considerations would dictate; it is at least thought to be desirable, for example, not to divide counties or cities between two or more districts.[2] The rule being thus admittedly and properly flexible, however, evasions are hard to prevent. The one hopeful thing that can be said is that public sentiment condemns the gerrymander far more than it did during the heydey of to-the-victors-belong-the-spoils politics, and it is to this awakened feeling that we must look for a sort of "gentleman's agreement" such as will restrain party majorities from taking the advantage that can always be wrung, if they are minded to do it, from legislation touching the distribution of representation.

Congressional regulation of elections

Congress has gone farther in regulating congressional elections than merely to require uniform use of the district system. Taking advantage of the clause of the constitution which authorizes it to regulate the "time, place, and manner" of elections, it enacted in 1872 that all congressmen shall be chosen by secret ballot [3] and in 1873 that congressional elections shall be held throughout the country at the same time, namely, on the Tuesday following the first Monday in November of every second year.[4] Previously, voting was in some instances *viva voce*, and elections were held at widely varying dates. Candidates are nominated as the laws of the several states provide. In most cases the direct primary is employed, but in several states the nominations are still made by the old type of district nominating convention composed of delegates representing counties, towns, or other sub-divisions.

Contested elections

Contrary to the English practice of referring contested elections to a judicial settlement, our constitution makes the House of Representatives the judge of the "elections, returns, and qualifications" of its members.[5] Accordingly, every dispute involving a seat is decided by the House itself. If a candidate is unwilling to concede his defeat, he may ask for and obtain a recount of the

[1] P. S. Reinsch, *American Legislatures and Legislative Methods*, 201-202.

[2] This is, however, sometimes done; and of course large cities, as New York and Chicago, are themselves divided—usually along ward lines—into districts.

[3] This does not preclude the use of voting machines.

[4] By exception, Maine and one or two other states are allowed to adhere to their former practice of holding their elections earlier in the year.

[5] Art. I, § 5, cl. 1.

CHAP. XXIII

votes as provided for in the state election laws, and, farther, he may carry his case to the House. According to national law, he must in that event serve notice on the candidate who has been reported elected, giving the grounds on which his contest is to be based; and the person so notified must make a formal reply. The papers are then transmitted to the clerk of the House, who puts the case in shape, reports it, and procures a reference of it to one of the three standing committees which the House maintains for the purpose. The committee weighs the evidence, hears the claimants, takes other testimony if desired, and prepares a report in favor of one candidate or the other, which the House usually accepts. Party considerations are likely to have much to do with the decision, and the English plan of turning over such cases to the judiciary for settlement is better. But, fortunately, contests are not numerous.[1]

Disadvantages of the short term

The term of members is two years, which is therefore the period of "a congress." When the constitution was framed it was the fashion to argue that "where annual elections end, tyranny begins;" and the authors of the "Federalist" found it necessary to devote one of their papers to a defense of the two-year term.[2] Nowadays it is generally conceded that the term is not too long, but too short. The average person elected to the House for the first time has no acquaintance with the body's methods of doing business, has had no legislative experience except possibly in a state legislature or a city council, and has only a superficial knowledge of the public affairs with which Congress is called upon to deal. Elected for only two years, he cannot progress far toward becoming a useful member, much less a leader, before his term expires. Many congressmen are, of course, reëlected, and are thus enabled to accumulate considerable knowledge and experience. But the number who serve for only one or two terms is proportionally large. Furthermore, a member cannot get far into his term before he must turn his thoughts to reëlection. This distracts his attention and divides his energy.

But worse still is the arrangement under which the group of members composing a given congress do not, as a rule, actually

[1] D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. XVI.

[2] No. LIII (Lodge's ed., 333-339). Under the original Revolutionary state constitutions, the members of the state legislature were elected annually in every state except South Carolina, and there biennially.

enter upon their duties together until thirteen months after their election. Members are elected, as we have seen, in early November. Their term begins on March 4 following. But unless the new congress is called in special session during the ensuing spring or summer, it does not meet until time for the first regular session to begin, namely, the first Monday in December. By that date, the term of the members is almost half expired; the next congressional elections are only eleven months distant; and the campaign for re-nomination is even nearer at hand. Meanwhile, with the new Congress elected and waiting to go to work, the old Congress sits through a full session—from December to March following the elections, usually doing little except to pass necessary appropriation bills. The elections may have shown it to be quite unrepresentative of the present feeling of the country.[1] It would be better if a new Congress, coming with a fresh mandate from the people, could begin work a month after its election; just as it would be better if a newly-elected president could take office considerably sooner than he does. The length of the congressional term and the arrangement for congressional sessions are two different matters; the term could be lengthened (to four years, for example) without altering the period between the election and the installation of a congress, and *vice versa*. At present, however, the unfortunate effects of each limitation is aggravated by the existence of the other.

Excessive interval between election and meeting of a congress

Four qualifications, including one of a negative character, are required of a representative by the constitution. He[2] must be twenty-five years of age, or over; he must be, at the time of his election, an inhabitant (not merely a legal resident for voting purposes) of the state in which he is chosen;[3] and he cannot hold, while a member of the House, any "office under the United States."[4] The last-mentioned restriction is construed to debar army and navy officers as well as holders of civil office; and it is hardly necessary to point out that, in debarring cabinet officers

Qualifications of members

[1] Here is an illustration of how the system works out: the 65th Congress, elected in November, 1916, with a Democratic majority, met December 2, 1918, and continued to sit until March 4, 1919, although the 66th Congress, with a Republican majority, was elected in November, 1918. A Democratic congress actively functioned for three months while a Republican congress-elect was waiting to be organized.

[2] Women are eligible; but it would be pedantic to use cumbersome phrases to denote both sexes throughout our discussion.

[3] Art. I, § 2, cl. 1.

[4] Art. I, § 6, cl. 2. A state office does not disqualify for membership. See W. W. Willoughby, *Constitutional Law of the United States*, I, 529.

it is the exact opposite of the unwritten rule in England which require every minister to have a seat in Parliament.[1]

Custom concerning residence

To these qualifications custom has added one other, namely, inhabitancy of the district represented. Here we come upon another important difference between American and European political usage. In England, for example, members of the House of Commons often sit for constituencies, *i.e.*, districts, other than those in which they live. The last vestige of legal residence requirements disappeared a century and a half ago. A man desiring to enter Parliament, but finding no opportunity in his own district, "stands" in some other district, wherever there is a chance and the party authorities will accept him as a candidate; or a member, defeated in the district which he has represented, turns to another district, in the hope of being kept in public life. His fortunes are not absolutely bound up with any single constituency, and he can afford to take a broadly national view of public affairs. There is nothing in the constitution or laws to prevent a man from doing the same thing in the United States, save that he could not, of course, become a candidate in any district outside the state in which he lived; and there have been a few such non-resident representatives, mainly congressmen living in the same city in which their districts were situated, but in a different portion of the city, *e.g.*, an uptown representative of a downtown New York district.

In general, however, it is assumed that a representative will be an actual resident of his district, and it is not worth while for an outsider to seek election. Local pride forbids taking a congressman from a different section of the state; only an actual resident, it is felt, will be duly diligent in securing appointments, public buildings, and other favors for the district; only a man whose personal and business interests are bound up with the district can be trusted to stand for what its people want on taxation, tariff, immigration regulation, and other public questions. The case for the home congressman seems to the average citizen absolutely conclusive.[2] Nevertheless it ignores the intent of the constitution that congressmen shall represent the people generally, and not simply their own constituents; and the requirement works positive harm by cutting off opportunity for good men living in districts dominated by a different party from their own to seek a congressional

[1] Officers under the crown, other than ministers, are debarred from the House of Commons. F. A. Ogg, *Governments of Europe* (rev. ed.), 97.

[2] See Lord Bryce's statement of it and comments on it, *American Commonwealth* (4th ed.), I, 189-192, and *Modern Democracies*, II, 53-55.

career, by giving an experienced and useful congressman who meets defeat in his district no chance to be returned by another constituency,[1] and, perhaps above all, by helping to keep alive the pernicious concept of the congressman as the district's official agent for procuring offices, grants, and favors.

Can other qualifications be required?

Several times the question has risen whether other qualifications than those stipulated in the constitution can be imposed. Legally, they cannot be; practically, they can be. Usage may establish them, as has been explained. And the House may make additions, as it did in 1900 when it refused to seat Brigham H. Roberts, of Utah, on the ground that he was a polygamist. This decision was of doubtful constitutionality. The proper procedure would seem to have been to seat the accused person and then expel him. But the action taken stands on the record as an evidence that, regardless of the theory of the matter, the House, in exercising its constitutional right to judge the qualifications of its members, can impose a test of which the constitution makes no mention.[2]

The Senate

The form given the second branch of Congress was, as we have seen, a product of compromise. To offset the preponderance of the large states in the House of Representatives, small and large states were given equal representation in the Senate; and to provide a counterweight to direct popular influence in the lower chamber, it was arranged that senators, like the president, should be elected indirectly and at longer intervals. Accordingly, the constitution as adopted provided that the Senate should consist of two members from each state, chosen by the legislature thereof for a term of six years.

Federal basis

The extremest demands of the small-state party were not met. Instead of being paid by the states, as was urged, senators are paid out of the national treasury, as are representatives. More important than this, instead of voting by states, as was demanded, they vote as individuals; all states have, indeed, the same number of votes, but the two votes of any given state are cast independently and may be recorded on opposite sides of a question. The Senate is therefore constructed on the federal principle, yet is not as com-

[1] "A strong man in English politics need never be without a seat in Parliament, but the ablest statesman in the United States has practically no chance of a seat in Congress if his own home district should contain a majority of voters who belong to the opposite political party." W. B. Munro, *Government of the United States*, 185.

[2] It has been established that no state may add qualifications to those fixed by the constitution. A. S. Hinds, *Precedents of the House of Representatives*, I, § 415. On the Roberts case see S. W. McCall, *The Business of Congress*, 37-40.

CHAP. XXIII

pletely federal as it might have been made; it is federal in respect to membership, but not in respect to compensation and voting.

Criticism of state equality in the Senate

The equality of the states in the Senate required a good deal of defense from the constitution's makers, and in later times it has often been regarded as an unfortunate, if not wholly unjustifiable, arrangement. It is pointed out that, contrary to earlier expectations, there has never been an alignment of states on the basis of size; that cleavages run on other lines, *e.g.*, agricultural as against commercial states; and that therefore the precaution of the framers in the interest of the small states has been proved unnecessary. Much is made, too, of the apparent anomalies for which the plan is responsible. New York, with more than ten million people, has two senators; Nevada, with seventy-seven thousand, has also two senators. On a proportional basis, New York would have two hundred and seventy senators! Pennsylvania has a million and a quarter more people than all New England; but New England has twelve senators and Pennsylvania two. The five states of New York, Pennsylvania, Illinois, Ohio, and Texas have thirty-six million inhabitants, or about thirty-four per cent of the total population of the continental United States. Yet in a Senate of ninety-six members they have but ten, *i.e.*, slightly more than ten per cent.

Proposed change

People who have been troubled by this apparent violation of democratic principle have suggested various remedies, chiefly that a state be allowed one additional senator for every million inhabitants in excess of some fixed number. It is pointed out that this would not mean an exact proportion, such as exists in the House of Representatives, yet would somewhat lessen the inequalities of the present system. At first glance, the proposal seems reasonable. Nevertheless there are weighty objections to it, as there would be to any other plan for overthrowing the present arrangement. To begin with, there is the almost insuperable difficulty of bringing about any change that would impair the equal suffrage of the states in the Senate. Not only would a constitutional amendment be necessary, but, under the provisions of Article V, the express consent of every state whose representation would become less than that of some other state would have to be obtained.[1] It is almost inconceivable that this condition could be met. But even if the

[1] Unless the pledge given the small states should simply be broken, which would be legally possible but is certain never to be done.

change could be brought about with no more than ordinary effort, it would be, for several reasons, undesirable. It would certainly lead to substantial increase of the number of senators, thereby impairing the upper chamber's present efficiency as a deliberative and revisory body. The House of Representatives is far too large for effective work except through committees; it would be unfortunate if the Senate were to find itself in the same situation.

Why the present arrangement is desirable

In the second place, the change would upset the fundamental balance which representation in Congress now involves. Criticism of the present arrangement commonly springs from the idea that representation, to be worthy of the name, must be based on and proportioned to numbers; whereas there is no essential reason why a senator may not be as truly a representative of five million people as of five hundred thousand, just as the president sometimes better represents the people of the entire nation than do several hundrd locally elected congressmen. A leading virtue of the Senate is, indeed, that it does not represent mere numbers. "What gives the Senate its real character and significance as an organ of constitutional government," says ex-President Wilson, "is the fact that it does not represent population, but regions of the country, the political units [*i.e.*, states] into which it has, by our singular constitutional process, been cut up. The Senate, therefore, represents the variety of the nation as the House does not. It does not draw its membership chiefly from those parts of the country where the population is most dense, but draws it in equal parts from every state and section . . . regions must be represented, irrespective of population, in a country physically as various as ours and therefore certain to exhibit a very great variety of social and economic and even political conditions. It is of the utmost importance that its parts as well as its people should be represented; and there can be no doubt in the mind of any one who really sees the Senate of the United States as it is that it represents the country, as distinct from the accumulated populations of the country, much more fully and much more truly than the House of Representatives does. . . . The House of Representatives tends more and more, with the concentration of population in certain regions, to represent particular interests and points of view, to be less catholic and more and more specialized in its view of national affairs. It represents chiefly the East and North. The Senate is its indispensable offset, and speaks always in its make-up of the size, the variety, the heteroge-

Opinion of ex-President Wilson

neity, the range and breadth of the country, which no community or group of communities can adequately represent."[1] It is an axiom of politics that in a bicameral legislature the two houses ought not to be mere duplicates one of another, but ought to be able to come at public questions with different backgrounds and points of view. Especially, as the author quoted suggests, is this desirable in a nation of the size and heterogeneity of the United States. Representation in one house by numbers and in the other by states is the best guarantee of this balancing of interests that can be devised in a federally-organized nation.

Original mode of election

Five or six different modes of choosing senators were considered by the constitution's framers. Direct popular election seemed to tend to an excess of democracy and found scant favor. Appointment by the president, with or without nomination by the state legislatures, contravened the separation of powers, and was equally unsupported. Election by the House of Representatives from nominees of the state legislatures made more appeal, but finally received the votes of only three state delegations. Selection by popularly chosen electors in each state was favored only by Hamilton and a few others. Election by the state legislatures seemed the least objectionable plan and accordingly was adopted, with the proviso that if a senatorial vacancy should arise, by resignation or otherwise, while the legislature was not in session, the governor of the state might make a temporary appointment until the legislature's next meeting.[2] Certain distinct advantages were, indeed, expected from legislative election. Members of the legislature, it was believed, would be likely to know the qualifications of senatorial candidates and, being themselves men of substance and responsibility, would elect persons of superior character, and especially of conservative temper. Chosen by the entire legislature, the senator would feel himself the representative, not of a faction or group, but of the entire state. The national and state governments would be brought together in a helpful way, and those people who feared that the strengthening of the former would entail the eventual extinction of the latter would be reassured. "An important wheel in the national machine was geared directly to the mechanism of state government so that the state legislature could never be eliminated without bringing down one branch of Congress as well."[3]

[1] *Constitutional Government in the United States,* 114-117.

[2] Art. I, § 3, cl. 2.

[3] W. B. Munro, *Government of the United States,* 148. See G. H. Haynes, *The Election of Senators,* Chap. I.

Process of election regulated by act of 1866

For three-quarters of a century each state legislature went about the choosing of senators in whatever manner it desired. In some cases the houses elected sitting separately, in others in joint session. Controversies were not infrequent, and finally, in 1866, an exceptionally troublesome contest in New Jersey led Congress to exercise for the first time the power which the constitution gives it to regulate the time and manner of senatorial elections.[1] The act then passed provided for a uniform mode of election, which prevailed throughout the country until 1913, and whose main features can be indicated as follows. The last legislature of a state chosen before the expiration of the term of one of the state's senators proceeded to an election on the second Tuesday after it convened. The houses first took a separate *viva voce* vote, and if any person received a majority in each house, he was declared elected. If no one received such majorities, the houses met in joint assembly at twelve o'clock on the following day and took a *viva voce* vote. If any person received a majority of the votes thus cast, he was declared elected; if not, the process was repeated, at least one vote being taken each day, except Sunday, until an election resulted. In practice, the members of the various parties commonly held a caucus in advance of the election and decided what candidate they would support.[2]

Objections to election by the legislature

National regulation was beneficial, but it did not prevent increasing criticism of election by the legislatures. As early as 1826 a movement for direct popular election was set on foot, and after the Civil War—notably after about 1885—the demand assumed large proportions. The prevailing system was objected to on several grounds. In the first place, it enabled men to be sent to the Senate who were not worthy of membership in that body, or at all events were decidedly inferior to others who might have been elected. The candidate who could bring the most influence to bear on the members of a legislature, or perhaps on a few who held the balance between party or other groups, was likely to win; and this influence took various questionable forms, not always stopping short of outright bribery. Time and again elections were controlled by political bosses or by corporations which found this an easy way of influencing legislation at Washington. At best, they ran on purely partisan lines. A second main difficulty was the effect of the system

[1] Not the place, as in the case of the election of representatives, for the reason that Congress was naturally not to have the power to determine where the legislatures should meet.

[2] G. H. Haynes, *The Election of Senators*, Chap. II.

on the legislatures themselves. Party spirit, keyed to a lofty pitch during a senatorial contest, failed to subside when the legislature turned to other aspects of its work. Electoral deadlocks were of frequent occurrence, because of the inability of any candidate to attain a majority, and the main business of the legislature was delayed and otherwise interfered with; besides, owing to failure to elect, a state sometimes had only one representative in the Senate for a year or two, or even longer.[1] Even in the election of the legislature by the people of the state harmful effects appeared, for the control often turned on the attitude of candidates toward certain senatorial aspirants rather than on the needs and interests of the state itself.

Movement for direct popular election

Discontent with these conditions, reënforced by the general feeling that indirect elections are undemocratic, gradually made the election of senators by the people a leading public question. In 1893 the House of Representatives passed by the requisite two-thirds vote a resolution submitting a constitutional amendment on the subject. The proposal failed in the Senate, and in the next ten years four or five similar attempts came to the same end. In 1892 and again in 1896 the Populist party declared for the change; in 1900 and successive presidential years thereafter the Democrats put a similar plank in their platform; in 1908 Mr. Taft asserted his personal approval of the proposal in his speech of acceptance, although the subject was not mentioned in his party's platform. More than two-thirds of the state legislatures passed favoring resolutions.[2]

Rise of nomination by direct primary

Meanwhile a number of states evolved a plan under which popular election was secured, to all intents and purposes, regardless of the fate of the proposed amendment. The means employed was the direct primary. By state law, the voters of each party were authorized to indicate at the polls which of the party candidates for a senatorship they preferred, and the nominations thus made were formally reported to the legislature. Usually that body was trusted, without any special precaution, to carry out the public will by electing the designated candidate of the preponderating party. Oregon and Nebraska, however, instituted a system under which candidates for the legislature were asked to pledge their support

[1] Two famous deadlocks of this kind were those in Pennsylvania when, in 1899, a successor to Senator Quay was to be elected, and in Delaware, where Mr. J. E. Addicks kept up a running fight for a senatorship from 1895 to 1903.

[2] The movement is fully described in Haynes, *The Election of Senators*, Chaps. v-x, with accompanying bibliography.

in advance to the "people's choice," irrespective of party. In either case there was no obligation other than moral; legally the legislature remained free to elect whomsoever it would. But the popular will was almost invariably carried out; indeed, in 1908 a Democratic senator was elected in Oregon by a Republican legislature. By 1912 senators were popularly nominated in a total of twenty-nine states, situated in all parts of the country, and election by the legislatures was fast coming to be quite as much a fiction as is the choice of the president by the electoral college.

Popular election under the Seventeenth Amendment

Under these conditions, the opposition in the Senate weakened. Accordingly, in 1912 the Seventeenth Amendment was got through both houses of Congress, and in 1913 it was proclaimed in force. Under its terms senators are elected directly by the people of the several states; and, as in the case of the House of Representatives, the electors include all persons who can vote for members of the "most numerous branch of the state legislature." If a vacancy arises, the governor of the state issues writs of election to fill it. The legislature may, however, empower him to make temporary appointments; and most legislatures have taken this action.[1]

Effects of the new system

The effects of the change to direct popular election cannot as yet be measured. Relief of the state legislatures from the burdens and distractions formerly entailed by senatorial elections has, of course, resulted automatically; these bodies now have a better opportunity than ever before to deal with the affairs of the states promptly and dispassionately. Of this great gain there can be no doubt. The effect on the Senate itself is less clear; more time will be needed to reveal it. Certainly the amendment wrought no abrupt change in personnel. Practically every senator who could have expected to be continued in office at the hands of his state's legislature has been continued on the popular basis. Furthermore, abuses arising from the lavish use of money in senatorial elections have not disappeared, as is evidenced by the Newberry controversy of 1921-22 [2] and by other less flagrant cases. Money is employed in a different way, because it is now the popular electorate that has to be reached; but senatorships may still, in effect, be bought. It seems probable that certain undesirable types of men who formerly

[1] In Pennsylvania, for example, where two senatorial vacancies arose in the winter of 1921-22 and were filled by temporary appointment by the governor.

[2] By a close vote the Senate decided, January 12, 1922, not to unseat Truman H. Newberry, senator from Michigan, for spending $195,000 in his campaign for election. A resolution of censure, however, declared such expenditure excessive, contrary to sound public policy, and dangerous to the perpetuation of free government.

reached the Senate will henceforth be kept out, notably the virtual appointee of a great railroad or other corporation. But popular election is no guarantee of fitness, and whether, after the generation of members that first came into the upper house by legislative election disappears, and the body comes to be composed entirely of men who were first elevated to its ranks by direct popular vote, it will show a higher level of ability, integrity, and achievement than in the days of Webster, Clay, and Calhoun, or of Allison, Spooner, and Hoar, remains to be determined. The prospect that it will do so is not, it must be admitted, flattering.

Term and continuity

The term of senators is six years. Some of the framers of the constitution favored a longer period; indeed, a few advocated election for life. But to most persons six years seemed sufficiently long to ensure the desired stability and conservatism. The rule puts the senator in a very different position from the representative. Unlike the latter, he has time in a single term to acquire experience, and even to attain a certain degree of leadership; and he can devote himself singlemindedly for several years to public affairs with only incidental thought of reëlection. Most senators, furthermore, have more than one term, and periods of service running to eighteen, or even twenty-four, years are not uncommon. Continuity of personnel produced by long terms and numerous reëlections is farther secured by the mode of renewing the membership. The original senators were divided into three classes, with terms expiring in two, four, and six years respectively, and thus an arrangement was instituted under which the terms of one-third of the members expire every two years.[1] The Senate, therefore, never finds itself in the position in which the House of Representatives is found every two years—a new body, with greatly altered membership, obliged to organize from the ground up. On the contrary, it is continuous: at least two-thirds of its members at any given time have served for as much as two years; leadership develops slowly and changes seldom; precedents and traditions are carried along on the current of a never-ending stream. It is in the longer term of service and the element of continuity, no less than in the larger power, that Lord Bryce finds the reason for the superiority which the Senate early acquired and has long enjoyed over the lower house.[2]

[1] In no case were both senators of a state placed in the same class, and the senators of states admitted later were always assigned, by lot, to different classes. Hence, barring vacancies arising from death or resignation, only one senator is elected in a state in any given year.

[2] *Modern Democracies*, II, 59.

Qualifications

Senators must be at least thirty years of age, and must have been citizens of the United States at least nine years. Otherwise, their constitutional qualifications are identical with those of representatives: they must be inhabitants of the states that elect them, and they cannot hold any office under the United States. Like representatives, too, they may not at any time be appointed to a civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during the time for which they were elected. Equally with the House, the Senate is endowed with the right to judge the elections, returns, and qualifications of its members, and here also the question has risen whether qualifications can be imposed in excess of those prescribed by the constitution. We have seen that the House has refused to seat a member-elect because he was a polygamist.[1] Asked to seat a senator-elect who, although not a polygamist, was accused of being a supporter of the Mormon Church, the upper house took what seems to be the better constitutional ground, namely, that any person duly elected and having the qualifications required by the constitution must be received, although he may be subsequently expelled.[2] Expulsion may be for any cause. But it is to be noted that neither senators nor representatives are civil officers of the United States, in the meaning of the constitution, and that accordingly they are not subject to impeachment.

Compensation of members of the two houses

Members of both houses have certain constitutional privileges and immunities. In the first place, they are entitled to compensation, at a rate fixed by law, and paid out of the national treasury. Until 1855 they were given only a small per diem allowance, but at that time a salary of $3,000 a year was authorized, which was increased in 1865 to $5,000, and in 1907 to $7,500.[3] Members of the two houses have always been paid at the same rate. In addition to their salaries, they receive liberal allowances for travel, clerk hire, and stationery; and the frank, *i.e.*, the privilege of sending free through the mails any amount of matter stamped with their name, is tantamount to a heavy subsidy, especially in the numerous cases

[1] See p. 345.

[2] In the case alluded to, which was that of Senator Smoot, a resolution for ılsion failed. Members can be expelled from either house by a two-thirds ɔ. More than a score, in all, have been expelled, most of them on charges lisloyalty growing out of the Civil War.

[3] This figure was first reached in 1873, but public disapproval caused a ɛrsion to the former amount within a year.

CHAP. XXIII

in which the right is abused by the distribution, at public expense, of tons of documents consisting mainly or wholly of speeches nominally prepared for delivery on the floor of Congress, although not necessarily actually delivered, and designed, in any event, for campaign uses.

Privileges of members

Other provisions of the constitution and laws, based on hard-won English usages, are designed to prevent interference with the member's freedom of attendance, speaking, and voting. A senator or representative may be arrested at any time for treason, felony, or breach of the peace,—which, as construed, means all indictable offenses;[1] so that he has really no exemption from the processes of the criminal law. But while attending a session, or going to or returning from a session, he cannot be arrested on civil process or compelled to testify in a court or serve on a jury. Moreover, "for any speech or debate in either house," he cannot "be questioned in any other place."[2] That is, he cannot be proceeded against, outside of the house to which he belongs, because of anything he may have said in the course of debate, committee hearings, or other proceedings properly belonging to the business of the house. He cannot, for example, be sued for libel or slander by a person whom he may have criticized. The privilege is sometimes used as a shield for unwarranted personalities, but it is fundamentally justifiable. If a member knew that he might be proceeded against at law by any person taking offense at his remarks in the exercise of his duties, he would speak and act, in view of the general publicity of congressional proceedings which now prevails, under an altogether undesirable sense of restraint.

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CHAPTER XXIV

CONGRESSIONAL ORGANIZATION

Regular and special sessions

The two houses of Congress are required by the constitution to convene at least once every year, on the first Monday in December, unless a law is passed designating a different date. As has been shown in the preceding chapter, there are strong reasons why a different arrangement would be preferable.[1] No action, however, looking to a change has ever been taken. In addition to these annual sessions, Congress is frequently assembled in special session on "extraordinary occasions" at the discretion of the president. Either house may be summoned without the other, and the Senate is often convoked separately to act upon executive appointments or treaties, with which the House has nothing constitutionally to do.[2]

Long and short sessions

Congresses have been numbered consecutively since the first one met in 1789; and it is customary to refer to the sessions of each Congress as the first or second session, as the case may be. When, however, a newly elected Congress has met in special session before the first Monday in the second December following its election, the sessions are numbered first, second, and third, beginning with the special session. Only very infrequently is a second special session held, making a total of four sessions for a single Congress; in any event, the serial plan of numbering is adhered to. The first session, which ordinarily begins in December of the odd-numbered years, is called the "long" session, and lasts well into the following summer; the second session, opening in December of the even-numbered years, is called the "short" session, since its duration is limited by the fact that the term of its members will expire at noon on the fourth day of March following. Unlike certain European parliaments, Congress is not obliged to remain in session any stated length of time. Unlike these parliaments, too, neither branch can be dissolved, or have its sessions sus-

[1] See p. 343.

[2] For the years in which the Senate has been convened in special session, see *Congressional Directory*, 67th Congress, 2nd Session (1921), 177.

pended or prorogued by the executive. Subject to the condition that neither house may adjourn without the consent of the other for a period longer than three days, or to any other place than that in which the houses shall be sitting, the matter of adjournment is left to arrangement between the houses themselves, save only that when they disagree as to the time of adjournment the president may intervene and adjourn them to "such time as he shall think proper."[1]

Organization of the House

A newly chosen House of Representatives, meeting at noon on the first Monday in December, is called to order by the clerk of the preceding House, and this officer continues to preside until the House has elected its regular presiding officer, the speaker, although there is nothing to prevent the members-elect from legally choosing some other person to act as their temporary chairman.[2] After calling the House to order, the clerk proceeds to call the roll of members by states alphabetically. Upon this roll are to be found the names of all members-elect whose certificates of election have been forwarded to the clerk of the House by the proper official in each state. If the right to a seat is claimed by some person other than the one holding such a certificate, the matter is referred for investigation and report, after the House has fully organized, to one of the standing committees on elections.[3] In the meantime the person named in the official certificate of election is presumed to have been legally elected, and he participates both in the organization of the House and in its regular legislative work after organization until it has been decided that he is not entitled to a seat.[4] As the roll-call proceeds, a member-elect may object to the admission of some other member-elect on the ground that for some stated reason he is disqualified for membership. Upon the completion of the roll-call, the oath of office is administered to the members in a body, except those whose qualifications have been challenged as just indicated; they are obliged to stand aside, and the oath is not administered to them until their right to membership has been

The roll

[1] Art. II, § 3, cl. 1.

[2] Ex-President John Quincy Adams was thus chosen under extraordinary circumstances in 1839. See J. A. Woodburn, *The American Republic*, 248-249.

[3] See p. 342.

[4] There have been at least three instances in the past few years in which such contests have not been decided until the last week of the term of Congress. Nevertheless, practically full salary was allowed both the successful and the defeated party to each case. See *The Searchlight*, IV, 9-10 (May, 1919); V, 3 (Dec., 1920); V, 8-9 (Mar., 1921).

CHAP. XXIV

fully established. Having once taken the oath of office, a member can be cut off from official connection with the House before the expiration of his term only by death, by resignation, by removal from his state, or by expulsion by a two-thirds vote of his colleagues.

Election of speaker

After having taken the oath of office, the first duty of the new House is to complete its formal organization. This ordinarily does not take long—seldom more than a single sitting—although there have been instances in which many weeks were consumed. The first important step is the election of the regular presiding officer, known as the speaker. After that, there is an election of a clerk, a sergeant-at-arms, a doorkeeper, a postmaster, and a chaplain. Each of these officers is obliged to take an oath to support the constitution, and truly and faithfully to perform the duties of his office to the best of his knowledge and ability. In former years, their oath required them to "keep the secrets of the House," but this has become obsolete. Each appoints all of the subordinates connected with his office.[1] In choosing the speaker, the members of the House vote orally; the other officers are customarily chosen by resolution prepared in the caucus of the majority party. None of these officials, not even the speaker, is required by law to be a member of the House; and, as a matter of fact, only the speaker is ever a member.

Clerk

Next in importance to the speaker[2] stands the clerk, whose duties are set forth in some detail in Rule III of the House.[3] He is responsible for keeping an accurate record of the proceedings of the House, including all points of order raised and the decisions thereon. This record is printed in the Journal of the House, which the constitution requires to be kept and to be published from time to time. Copies of the printed Journal are furnished to every member, and are also sent to designated officials in every state. The clerk issues, at the direction of the House, all writs, warrants, and subpœnas; he certifies to the passage of all bills and joint resolutions; he makes contracts for furnishing supplies or labor required by the House; he keeps and pays the stationery accounts of members,[4] and pays the officers and employees of the House their monthly salaries. The performance of these and other duties gives

[1] House Rule II.

[2] The speaker's office will be described presently.

[3] *House Manual and Digest*, 66th Congress, 3rd session, 273-276.

[4] House Rule III. For the strange things paid for out of this "stationery" account, see *The Searchlight*, IV, 8 (June, 1919); V, 6-7 (Dec., 1920); V, 10-11 (Mar., 1921).

employment to a staff of more than thirty subordinates, appointed by the clerk himself, including a chief clerk, journal clerks, two reading clerks, bill clerks, disbursing clerks, and others.[1]

Sergeant-at-arms

The sergeant-at-arms is required to be present in the House during its sittings, and to maintain order, under the direction of the speaker or chairman of the committee of the whole. If for any reason the office of clerk is vacant, the sergeant-at-arms makes up the temporary roll used at the organization of a new House. He also executes the commands of the House, by summoning absent members, serving subpœnas for witnesses, and in other ways. From him members obtain their salaries and mileage allowances, as provided by law.[2] Half a dozen subordinates assist him in these various duties.

Other officers

The doorkeeper enforces the rules regulating admission to the floor of the House, and is required to file with the committee on accounts at the beginning and end of each session of Congress an inventory of all furniture, books, and other public property in the committee and other rooms under his charge.[3] Connected with the office is a staff of upwards of seventy messengers, clerks, and other subordinates. The postmaster superintends the post-offices maintained in the Capitol and the House office building for the accommodation of members and employees of the House.[4] His twenty-five or more assistants attend, among other things, to the collection and distribution of the mail of members of the House. The chaplain is required to be present at the opening of each day's session, and to open it with prayer.[5] All of these offices and subordinate positions fall to supporters of the dominant party in the House for the time being; and since party control changes frequently, there is little continuity of staff, and the efficiency of the work, largely routine and yet important, suffers.

Adoption of the rules

After the principal House officers have been elected, it is customary for one of the older members of the majority party to move the adoption of the rules of the preceding congress.[6] If any considerable number of members feel that the rules ought to be changed, this is the time for them to propose alterations; for, once the old rules are re-adopted without change, it has been found

[1] For the complete list, see *Congressional Directory*, 67th Congress, 2nd session (1921), 235-238.

[2] House Rule IV.

[3] House Rule V.

[4] House Rule VI.

[5] House Rule VII.

[6] The House rules are printed in full, with annotations, in *House Manual and Digest*, 66th Congress, 3rd session (1921), 265-421.

CHAP. XXIV

well-nigh impossible to inaugurate reforms in procedure, however essential they may be to the proper functioning of the House as an effective instrument of democratic government. A few spirited attempts have been made to introduce such amendments at this stage of proceedings in recent years. But they have proved futile, largely because the older, more experienced managers of the House profit by the old rules; and newly elected members are generally too unfamiliar with the rules as they are to appreciate the importance of a thorough revision. When, therefore, the old rules are once re-adopted, as always happens, there is even less chance of drastic amendments getting through; for under the rules all proposed modifications are automatically referred to the committee on rules, which is made up of a few tried leaders of what is commonly called the House "machine." Naturally, these leaders are rather more averse to changes in rules which make them almost omnipotent in House proceedings than is any other group of members. Any proposed amendment, therefore, which seems even remotely to threaten their continued domination of House affairs will be promptly smothered by the rules committee, and will never officially be heard of thereafter while that Congress lasts. It is practically impossible to compel the committee on rules—or, indeed, any other committee—to report on a matter referred to it, if the committee is itself unfavorable to the proposal.[1] In this manner the House was, in effect, denied an opportunity to discuss over sixty amendments to the rules offered a few years ago by a group of "insurgents."[2] It is merely beating the air to propose important modifications of the rules after the House has completed its organization: the time to accomplish needed reforms is at the very opening of the first session of a new Congress.

Development of the rules

Although differing in many respects from the rules governing other parliamentary bodies, the rules of the House of Representatives are, speaking broadly, based upon general and recognized parliamentary law, upon the rules and precedents of the English House of Commons, and upon the "Manual" prepared by Thomas Jefferson for the guidance of the Senate when he was its presiding officer.[3] Originally, the rules were few in number and easily understood and mastered; today, they are an elaborate and highly complicated code, which few members ever succeed in fully learning.

[1] See p. 382.

[2] L. Haines, *Your Congress* (Washington, 1915), 93-94.

[3] Jefferson's Manual is printed in the different editions of the *House Manual and Digest* and the *Senate Manual.*

This change has not been the result of frequent revisions or of wholesale additions or renovations; for such overhaulings have been extremely rare. Instead, to the few and comparatively simple rules with which the House started, new rules have been added, little by little, to meet special exigencies as they have arisen from time to time in the century and more of its existence. Accumulating thus year after year, the rules have now become intricate, contradictory, and imperfectly understood by most members.[1] Even the speaker, who, as presiding officer, is supposed to be thoroughly familiar with them, requires the assistance of an expert parliamentary clerk, who always stands at the speaker's right hand ready to advise when a difficult parliamentary situation arises. The decisions of the various speakers in thus interpreting and applying the rules constitute the "Parliamentary Precedents of the House of Representatives," which fill eight or more ponderous printed volumes.[2] Perhaps the most impressive characteristic running through all these accretions to the rules has been the steadily increasing concentration of control over the time and business of the House in the hands of the dominant leaders of the majority party, especially the speaker and the committee on rules, together with the corresponding narrowing of the opportunities afforded the minority party to interfere with the execution of the program of the majority, either by way of effective criticism in debate or by resort to obstructive or dilatory parliamentary tactics, called filibustering.[3]

The speaker

As the "central figure in the House of Representatives," the speaker deserves somewhat fuller comment than has been given the other officers. The rules require him to take the chair at the hour appointed for a sitting of the House, to cause the journal of the preceding sitting to be read, to preserve order and decorum, and, in case of disturbance or disorderly conduct, to cause the galleries to be cleared. He has general control over the hall of the House and of unappropriated rooms in the House wing of the Capitol. He signs all acts, addresses, joint resolutions, writs, warrants, and subpœnas ordered by the House; decides all questions of order, subject to an appeal by any members; puts all questions to a vote; and appoints select and conference committees which are authorized from time to time by the House. As a member of

Miscellaneous powers

[1] D. S. Alexander, *History and Procedure of the House of Representatives*, 182.

[2] Edited by Asher C. Hinds, long a clerk at the speaker's table (Washington, 1899).

[3] Alexander, *op. cit.*, 184.

CHAP. XXIV

the House, he retains the right to vote on any question, though the rules provide that he shall not be required to vote "except where his vote would be decisive," or when the House is voting by ballot.[1] He may appoint any other member to serve as presiding officer in his place for a period not to exceed three days, except in case of illness, when the substitution may be made for ten days; and when he is absent and has failed to provide a substitute, it is permissible for the House to elect a speaker *pro tempore.*

English and American speakers

But the foregoing list of powers and duties conveys only a very imperfect idea of the speaker's real position and influence. The office itself, like so many others, has been inherited from English political practice by way of our own colonial experience. For centuries the speakership of the English House of Commons has been an honorable and distinctive institution; and an official bearing the same title and exercising many of the same powers not only appeared in colonial assemblies and state legislatures prior to the adoption of the constitution but is found in every state legislature today. The framers of the national constitution left later events to determine which sort of a presiding officer the speaker of our national House of Representatives should become—whether, like his English prototype, an impartial presiding officer, a moderator of markedly judicial temperament, wholly unidentified with any partisan group within or without the House over which he presides; or an official conforming to the type of speaker which had already been evolved in American colonial and state legislatures, *i. e.,* an official who, whatever other qualities he might possess, was primarily a political leader and an active partisan. As a matter of fact, congressional speakers, almost from the outset, turned out to be officials of the latter sort; and, until within the past decade, they have furnished, in some measure at least, that official political leadership in legislative affairs which is nowhere provided for in our constitutional system, but which in England is supplied by the cabinet. In recent years, however, the political leadership of the speaker has been somewhat diminished, being in part supplanted by the leadership of a small group of experienced managers of the House who hold strategic positions in the committee system and function largely through the majority party caucus.

Importance of the speakership

Until this change set in, about 1910, the speaker held a position of importance second only, in point of political influence, to that of the president; while in the field of legislation his influence at

[1] House Rule I, § 6.

times even exceeded that of the president. To this exaltation of the speakership several different, although related, factors contributed. In the first place, with but few exceptions, the speakers have been men endowed with natural qualities of leadership which have brought them to the front in their respective parties even before their elevation to the speakership; in proof of which one needs but to glance over the long list of persons who have held the office and observe the names of Henry Clay, James K. Polk, Robert C. Winthrop, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, and Thomas B. Reed. Despite the high political importance which has attached to the office in times past, however, only one speaker ever succeeded in reaching the presidency, although Blaine narrowly missed it. This result has not been altogether fortuitous; for whoever holds the speakership is almost certain to rouse antagonisms within his party, as happened notably in the case of both Blaine and Reed, and this, of course, makes the attainment of the presidency difficult or impossible.

Prerogatives of the speaker

Personality and standing as a party leader may account for the promotion of an individual to the speakership, but they only partially explain the extraordinary power and influence which the speakership, as an office, early developed and to a considerable extent retains. The reasons for this weight of authority are to be found in certain of the speaker's well-known prerogatives. In the first place, the speaker has the right not only to put questions and to decide votes and points of order, as indicated above, but also to assign the floor to members who want a hearing. This is called the power of recognition. Without formal recognition by the speaker, no member can obtain the ear of the House. This right the English speaker endeavors to accord impartially to members of all parties; but the American speaker is quite a stranger to any such sense of obligation. To be sure, he is bound to follow the rules of the House, and the rules give a certain precedence to some committees or to their chairmen, and certain days are set apart for the consideration of special classes of business.[1] But with all due allowance for such limitations, the speaker still has wide opportunity to exercise quite arbitrarily the right of assigning the floor to members. Again and again when members have sought to obtain recognition without having previously arranged with the speaker to be recognized, that officer has inquired, "For what purpose does the gentleman rise?"—and then has decided whether or not to recognize him,

1. Power of recognition

[1] See p. 383.

CHAP. XXIV

according to whether the member's purpose met with the speaker's approval. In this way speakers have been able to prevent to a greater or less extent the consideration of motions and bills to which they personally, or the groups to which they belonged, were opposed. Closely related to this power of recognition has been the power, assumed in 1890, to refuse to entertain dilatory motions, *i. e.*, motions which are clearly intended to delay action by the House as a means of obstructing the program of the majority party.

2. Power of appointment

Another factor which added immeasurably to the speaker's power in the recent past was his right to appoint all committees. Although a sense of obligation to influential leaders who assisted in his election to the speakership, and loyalty to the traditional seniority rule governing committee promotions, tied his hands to some extent, abundant opportunities remained to advance the political fortunes of his friends by appointing them to important committees; and, on the other hand, to inflict punishment upon those who incurred his displeasure, by relegating them to unimportant committees, some of which, for lack of anything to do, have not met for upwards of thirty years. At the same time, the speaker could make up committees having charge of leading measures, like tariff and appropriation bills, in such a way as to have a decisive influence upon both the form and the fate of these measures. Especially important was the power to appoint the most highly privileged and most powerful committee of all, namely, the committee on rules, with which went also the right to serve as that committee's chairman.[1]

The "revolution" of 1910-11

Concentration of such prerogatives in the hands of dominating personalities and recognized party leaders virtually converted the speakership in the days of Reed and Cannon into an instrument of autocratic control over the destiny of both men and measures.[2] The number of members who chafed under the yoke of "Cannonism," as the system came to be called, increased year by year with the growth of the progressive movement in the ranks of the Republican party; and, after long waiting, a promising opportunity to rise in revolt appeared in March, 1910. At that time a combination of "progressive" Republicans and the Democratic minority,

[1] See p. 372.

[2] W. B. Hale, "The Speaker or the People," *World's Work*, XIX, 12805-12812 (Apr., 1910).

after a prolonged and dramatic session,[1] succeeded not only in deposing Speaker Cannon from membership in the committee on rules, but in enlarging that committee from five to ten members, in the hope of making it somewhat more representative of party sentiment in the House; and at the same time the speaker was deprived of the right to appoint the committee. When the next Congress organized, in the following year, the speakership was stripped completely of the power of appointment, except in the case of select and conference committees. As a result, the only prerogatives which the speaker enjoys today are the limited power of appointment just mentioned, the very important power of recognition, and the sometimes important power of reference, *i. e.*, the power to decide to what committee a public bill shall be referred, provided the clerk of the House (who normally makes the assignments, according to the nature of the bill) is in doubt.[2]

The party caucus

To the power of appointment, as exercised for more than a century by the speaker, the party caucuses, especially the caucus of the majority party, immediately fell heir; and before explaining how committee assignments have been made since the change took place it will be well to say something about the highly important, extra-legal, and little understood aspects of House organization involved in the caucus system.

Party discipline in the House

It is not always easy for an outsider to appreciate the dominant position which the majority party caucus now holds in controlling the formal action of the House in all matters of the first importance.[3] To understand it, one must have a clear conception of the effectiveness of party discipline in a body elected, organized, and largely conducted on strictly party lines. The caucus is naturally controlled by a comparatively small group of experienced leaders, well versed in the intricacies of House procedure and skilled in the art of managing their less experienced colleagues. In the hands of these leaders the majority caucus has become a powerful instrument of control over the rank and file, especially over the new members, unfamiliar with the ways of the House.

[1] E. H. Abbott, "The Liberation of the House," *Outlook*, XCIV, 750-754 (Apr. 2, 1910); C. R. Atkinson, *The Committee on Rules and the Overthrow of Speaker Cannon* (New York, 1911).

[2] C. R. Atkinson and C. A. Beard, "The Syndication of the Speakership," *Polit. Sci. Quar.*, XXVI, 381-414 (Sept., 1911).

[3] For a fuller discussion of this important institution, see L. Haines, *Your Congress*, Chap. IV.

CHAP. XXIV

For example, all members who participate in a party caucus are bound by the caucus action, unless released by the caucus itself. Consequently a member who, having participated, afterwards refuses to abide by the decision of the majority—who, in other words, commits the unpardonable sin of "bolting" the caucus—may almost be said to take his political life in his hands. At any rate, he is certain to be marked for discipline in various effective ways: he is likely to lose his place on important committees when the next committee assignments are made; the measures in which he has a peculiar personal interest are likely to be side-tracked, perhaps smothered; appropriations to be expended in his district may be cut off, or greatly reduced in amount; and in various other ways he can be made to feel the wrath of the leaders for his refusal to "go along."

Defense of the system

Such power to mar, if not actually to ruin, a member's career in the House goes far toward explaining the futility of spasmodic, isolated, and unorganized revolts against the prevailing system. The system is not, of course, without its apologists, and the argument which they put forth has a plausible appearance. The rules of the House, they say, must be taken as reflecting the wishes of the majority of the members. A dissatisfied majority can change the rules at any time. An arbitrary speaker can be overruled, or even deposed, by a majority vote. Committees may be reconstituted and compelled to report upon any matter referred to them if a majority of the House so orders. Therefore, runs the argument, since the rules and the other features of the system remain substantially unaltered from Congress to Congress, they must be regarded as fairly satisfactory to all but a few unreasonable members who are unable to adapt themselves to the ways of the majority.

Fallacy of the argument

Speaking strictly, all this, of course, is true. None the less, the argument is fallacious. The majority referred to is usually fictitious; the existence of the two rival party organizations, functioning through caucus action, in which the influence wielded by the experienced managers who profit by the old system is decisive, makes House majorities for any of the purposes named practically impossible. Actually, the degree of independence enjoyed by individual members is extremely small. Opportunities in connection with really important matters to act solely as their best judgment dictates rarely arise; and situations in which a coalition between a united minority party and a dissatisfied or insurgent faction within

the dominant party are still more uncommon. It is, therefore, much nearer the truth to say that the rules of the House and the degree of power wielded by the speaker and by the committees are in reality determined, not by the majority of the entire House, but rather by the majority in the caucus of the dominant party, which, quite possibly, may in fact represent the views of only a minority of the House as a whole.

Functions of the caucus

Long before 1911, members of both the majority and minority parties were accustomed to meet from time to time in secret caucus. But during the past decade new and extremely important functions have been assumed by the caucus, especially the majority-party caucus. The operations of the latter now extend to not fewer than five important matters: (1) the selection of House officers, (2) agreement upon plans of united action on policies or measures before the House; (3) designation of members to be elected to the various standing committees; (4) supervision and control of the reports of important committees; and (5) the actual shaping of the detailed provisions of the most important legislative measures.[1]

1. Selection of the speaker and other officers

The constitution provides that the House shall elect its speaker and other officers; and in form the regulation is complied with, as we have seen. Actually, however, what the House does is merely to ratify the slate of officers previously agreed upon in the secret, unofficial, caucus of the majority party; and, in view of the strictness of party discipline which usually prevails, the decision of a majority of that unofficial body determines the formal action of the House as a whole. It has long been quite possible, therefore, for a member to be elected speaker who is not favored by a majority of the House as a whole, especially when there has been a close caucus vote in the choice of candidates. In other words, owing to the binding nature of caucus decisions, it is possible for a minority of the entire House to dictate the choice of this most important House officer.

2. Control of committees and legislation

The use of the caucus to bring about united action of the party members in supporting or opposing measures of exceptional importance after they have come before the House reaches back almost equally far in our legislative history. But to these original functions recent developments have added the others enumerated above, which are even more important and far-reaching. First of all, the majority caucus inherited, as we have observed, the speaker's power

[1] W. G. Haines, "The Congressional Caucus To-day," *Amer. Polit. Sci. Rev.*, IX, 696-706 (Nov., 1915).

CHAP. XXIV

of appointment. At the same session when this devolution occurred, the majority caucus assumed the right to review and control the action of the most important committees before they reported to the House. This was accomplished by the adoption of a resolution in the Democratic majority caucus, in April, 1911, which directed the Democratic members of the various committees of the House not to report to that body on important legislative measures until they had first communicated their proposed action to the caucus and had received permission from that body to report to the House. Shortly after this we find the majority caucus debating the details of important bills, and even assuming the task of perfecting the provisions of legislative measures before those measures were brought up for consideration on the floor of the House. Thus, every important provision in the Glass currency bill of 1913 (afterwards enacted as the Federal Reserve Act), and also of the Clayton anti-trust bills passed in the following year, was whipped into final shape in the Democratic caucus before the bills appeared in the House at all. Substantially the same degree of caucus control over committees and over bills is understood to have characterized the action of more recent Republican House majorities.

In view of these developments, one must constantly bear in mind that in studying the formal House organization and procedure one is observing only a small part of the actual process of law-making; and that behind the formal organization and the open sessions of the House stands the powerful caucus of the dominant party, whose sessions are never thrown open to the public, and whose proceedings are never published in the official journal of the House, or even in the report of debates, called the "Congressional Record."

Committee system

From this attempt to characterize what may not inappropriately be described as the "invisible government" of the House of Representatives, we may pass to the last important feature of House organization, namely, the committee system. When a body of more than four hundred members finds itself obliged to dispose of twenty thousand or more bills and resolutions biennially, some form of division of labor, some method of sifting the avalanche of legislative proposals, is certain to be devised. The answer to the problem in the present case is the committee system, under which the entire membership of the House is divided into small groups—miniature legislatures, they have been called—each group or committee handling only a special class of measures.

Originally these House committees were few in number. But, partly owing to the increase of legislative business, partly on account of the supposed necessity of according members the dubious distinction of holding a committee chairmanship (of what committee, matters little to many members), and thus enjoying the reputation and the perquisites, or spoils, that go with committee chairmanships, and partly owing to the natural tendency, once a given committee was established, to continue it regardless of its usefulness, the number has grown until the present House (1922) has sixty permanent standing committees.[1] Of this number, only about a dozen can be said to be of large importance: chiefly the committees on ways and means, appropriations, the judiciary, banking and currency, interstate and foreign commerce, rivers and harbors, post-offices and post-roads, agriculture, military affairs, naval affairs, and rules. Now and then something arises to give temporary prominence and importance to other committees, as has recently happened in the case of the committee on foreign relations; and a few further committees which are now seldom heard from were, in times past, of great importance, for example, the committee on territories. Many, if not the majority, of House committees, on the other hand, may be said, upon good authority, to be useless so far as being effective instruments of legislation is concerned; and several, as has already been stated, having nothing to do, have not met for upwards of a generation. Nevertheless the chairmen of these phantom committees are entitled to the same allowances for stationery and clerk hire that are granted to chairmen of really useful and overworked committees.[2]

Number of committees

Their importance

In size, House committees range all the way from two members up to thirty-five in the case of the reorganized committee on appropriations.[3] No member may serve on more than four standing committees, and the majority belong to only two or three. About a score of the most important committees meet regularly on certain days each week; the others meet, if at all, at the call of the chairman. On every committee both parties, and sometimes third parties, are represented; but the dominant party always has a safe working majority of from three to eleven members.

Size of committees

[1] A list of House committees and the various assignments of members is printed in *Congressional Directory*, 67th Congress, 2nd session (1921), 196-227.

[2] For a vigorous arraignment of this feature of House organization, by a former member of that body, see *The Searchlight*, III, 1-4 (Feb.-Mar., 1918), 12-15 (May, 1919); also L. Haines, *Your Congress*, 86-92, 101-102, 114-117.

[3] See p. 380.

CHAP. XXIV

Mode of appointment

The chairmen and other members of these standing committees are nominally elected by the House at the beginning of each Congress; actually, they are chosen by, or under the direction of, the respective party caucuses. From the organization of the government down to 1911, the right to make up the standing committees of the House was, as we have seen, a main prerogative of the speaker. During the eight years of Democratic ascendancy following the date mentioned this power, however, was exercised by the regular committee on ways and means, subject to the approval of the majority and minority caucuses. The majority members on this committee were chosen in the majority caucus at the opening of each new Congress; the minority members of the committee were similarly chosen in the minority caucus. The chairman and other majority members of all of the remaining committees were then selected by the majority members on this "committee on committees," and the minority members on each committee were in a similar manner named by the minority of the committee on committees. Then the action of these two groups, having first been approved by their respective party caucuses, was reported to the House, which proceeded formally to "elect" the committees thus chosen. In the second Congress after this innovation was introduced the Republican minority caucus delegated to its floor leader complete authority to assign all the minority committee positions.

New form of committee of selection (1919)

The committee on ways and means[1] thus continued to serve as a committee on committees until the Republicans regained control of the House in 1919 and, by caucus action, created a special committee along new lines.[2] The committee on committees was now made to consist of one member from each state having Republican representation in the House, which means at that time a committee of thirty-six members. Furthermore, in making committee assignments, each member was permitted to cast a number of votes equal to the number of Republican representatives from his state. This resulted, in 1919, in giving the various members of the committee of selection all the way from one to twenty-nine votes; only ten members had as few as one or two votes, while nine had more than ten votes apiece. The minority party, however, continues to employ the minority members of the ways and means committee as its organ of selection.

[1] The chairman of this committee was also the majority floor leader until 1919. The minority floor leader has usually been the party's unsuccessful candidate for the speakership in that Congress.

[2] *The Searchlight*, IV, 3-6 (May, 1919).

Seniority rule

The principle which governs the action of the committee on committees, however it may be made up, in distributing committee chairmanships permits little or no consideration to be given to experience, training, or other qualifications. Disregarding these matters almost entirely, the committee religiously adheres to the traditional rule which requires all chairmanships, and indeed committee positions generally, to be assigned on the basis of seniority, *i. e.*, length of service in the House. A new member has thus practically no chance of securing the chairmanship of a single committee, even though he be a man of the most preëminent ability. Indeed he counts himself fortunate if he secures the lowest position on a committee of secondary, rather than of tertiary, importance. The names of new members are uniformly placed at the bottom of the committee rolls, both on the majority and the minority side of the House. If a member succeeds in being reelected several times, he will gradually make his way up toward a chairmanship. When finally he stands next to the chairman of a given committee in point of seniority, he is spoken of as the "ranking member;" and when the next vacancy occurs in the chairmanship his claim, based upon length of service and perhaps nothing more, will be held superior to all other claims, provided his party is still in control of the House, and provided, farther, that his own record in the House has been marked by a satisfactory degree of "regularity."

Work of committees

The nature of the legislative measures assigned to the important committees mentioned above is sufficiently indicated by the committee titles, except, perhaps, the committees on ways and means, appropriations, and rules. The committee on ways and means has charge of all taxation, including tariff, measures.[1] The committee on appropriations, reorganized in 1920,[2] now has jurisdiction over all appropriations, and is frequently referred to in the press as the budget committee. The rules committee is by all odds the most powerful of all House committees, partly because of the inherent nature of its functions, and partly because, along with nearly a dozen other committees, including those on ways and means and appropriations, the committee on rules enjoys the advantage of being permitted to report to the House at any time. "It shall always be in order," runs House Rule XI, "to call up for consideration a report from the committee on rules, and, pending the consideration thereof, the speaker may entertain one motion

[1] See p. 416.

[2] See p. 423.

to adjourn; but after the result is announced he shall not entertain any other dilatory motion until the said report shall have been fully disposed of."[1]

Control of House business by the committee on rules

The committee on rules was first made a standing committee in 1880, though not until some ten years later did its potentialities as an organ of majority control begin to be realized. Successive rulings of the speaker and orders of the House gradually invested the committee with power effectually to control the entire order of business by means of special rules to meet special situations as they arose. Prior to the revolution of March, 1910, the speaker not only served as chairman of this committee but appointed the other four members, who naturally were men of his own disposition and views. His official connection with the committee, and the highly privileged character of all its reports, enabled Speaker Cannon to exercise practically absolute control over all important legislation, and almost literally to determine what might and what might not be considered by the House. His deposition from membership in this committee, the selection of its members by party caucuses, and its enlargement to ten, and later to twelve, members, have in no sense diminished the power of the committee over the legislative business of the House. In some ways these changes have been beneficial, even though they have worked to divide and dissipate responsibility for what the House is permitted to do. But the committee controls, no less than before, with a rod of iron. Not only may it, through special rules, limit the time of debate allotted to measures, but it may specify what sections can be amended, and the number, and even the nature, of permissible amendments.[2] Moreover, it may at any time interrupt the discussion of a measure and, by another special rule, thrust forward some other bill for consideration. Insurgents now and then catch the House managers napping and succeed in getting a certain bill before the House contrary to the intentions of the "machine." But in such an emergency the committee on rules can always be hurriedly convened and a special rule to meet the situation quickly devised and reported, not only interrupting consideration of the insurgent measure, but indefinitely side-tracking it in favor of other business. Furthermore, the

[1] In practice, this rule has been modified somewhat. A report of the committee on rules is not in order when the House has voted to go into committee of the whole; also a conference report has precedence over it. *House Manual and Digest*, 66th Congress, 3rd session, 312.

[2] Special rules of this sort are frequently called "gag-rules." Examples may be found in *The Searchlight*, VI, 7-8 (July, 1921); VI, 6 (Aug., 1921).

committee on rules has been known to draft a bill over night, introduce it in the House the next morning, and force its passage the same day, without any opportunity whatever for reference to a standing committee.[1] In so far as this happens, the House has virtually abdicated its rights as a deliberative law-making body.

Steering committee

Closely coöperating with the committee on rules in controlling the business of the House is the extra-legal and uni-partisan "steering committee." This committee—which, of course, is not included in the official list of House committees—is elected by the majority party caucus and contains no minority members. The majority floor leader, who is likewise selected in the majority caucus, is the chairman; and at the present time there are thirteen other members. The committee's main business is to select from the great mass of bills which encumber the House calendars those which the majority managers wish to advance to final consideration; and its work is especially important in the last crowded days of a session. The selection of measures having been made, the steering committee relies upon the committee on rules to get them before and through the House in a form satisfactory to the majority leaders.

Organization of the Senate

The organization of the Senate differs from that of the House in a number of respects. In the first place, the Senate is a permanent body, the terms of only one-third of its members expiring at a given time; whereas the terms of all members of the House end simultaneously. It is therefore possible for the entire membership of the House to change every two years, while it is possible for only about one-third of the membership of the Senate to change in the same period. Being thus a permanent body, the Senate is not obliged to go through a formal process of organization every two years, such as takes place in the House at the opening of every new Congress. Indeed, the Senate may be said to have been continuously organized since it first convened in 1789.

Presiding officer—the vice-president

Secondly, the Senate's presiding officer, *i. e.*, the vice-president of the United States, is named for it in the constitution; consequently there is no partisan or factional contest over the control of that position.[2] Furthermore, the vice-presidency carries with it none of the power over Senate deliberations which is associated with the speakership in the House. Not being a member of the Senate, the vice-president may not vote on measures coming before

[1] As happened in the case of a ship purchase bill in 1915. See L. Haines, *Your Congress*, 94-96.

[2] The Senate elects a president *pro tempore* to serve in the absence of the vice-president.

CHAP. XXIV

it, except to break a tie; otherwise, it would happen that the state from which he came would have three votes—his own and those of the state's two senators. From April, 1789, when the Senate first organized, to March 4, 1915, there were one hundred and seventy-nine instances of the use of the casting vote, by twenty-one different vice-presidents, the great majority occurring in connection with comparatively unimportant matters.[1] As a presiding officer, the vice-president much more nearly resembles the English speaker, or better, the Lord High Chancellor, who presides in the House of Lords, than does the speaker of the House. He is simply a presiding officer, or moderator. As such, he puts questions to a vote, recognizes members, and decides points of order, subject to appeal by any senator, and even leaving specially difficult questions of order to the decision of the Senate itself. Unless the vice-president is a person of extraordinary force, which rarely has been the case, and also of high party standing, he never seeks to play the part of a political leader in the Senate, much less to control senatorial action.

The caucus and committee on rules

In the third place, the Senate is a much smaller body than the House, containing only a little more than one-fifth as many members. Hence it not only requires a less elaborate organization, but it does not feel obliged to concentrate vast powers in the hands of a small group of managers in order to transact business with any degree of effectiveness. The party caucus exists, to be sure, but it is a much less powerful institution in the upper chamber than in the lower; and individual senators enjoy a degree of independent action quite unknown to representatives. There is a committee on rules in the Senate as in the House, but it has none of the autocratic power to control business which the House committee exercises.

Former lack of restriction on debate

Partly owing to its small size, the Senate has not even found it necessary, until very recently, to place limits upon the freedom of debate; whereas the House for many years past has operated under the strictest sort of closure rules. This privilege of unrestricted debate in the Senate has, however, at times been abused. More than once members who have succeeded in obtaining recog-

[1] These have occurred as follows: in connection with nominations, 13; treaties, 3; elections of officers and questions of organization, 7; procedure, 39; bills and resolutions (general), 91, (local) 5, and (private) 21. H. B. Learned, "Casting Votes of Vice-Presidents," *Amer. Hist. Rev.*, XX, 571-576 (Apr., 1915); *ibid.*, "Some Aspects of the Vice-Presidency," *Amer. Polit. Sci. Rev.*, Supplement, VIII, 162-177 (Feb., 1913).

nition have been able to keep the floor, to the complete exclusion of other business, either until the expiration of the congressional session or until they were granted certain concessions. No serious effort to amend the rules so as to end such abuses took place until 1917, when a rule was adopted under which it is now possible, although not easy, to bring debate to an end. The process is as follows.[1] First, a petition to close the debate must be signed by one-sixth (sixteen) of the senators. On the second calendar day after this petition has been filed the roll of senators is called on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" If there is a two-thirds vote in the affirmative, the measure before the Senate becomes the "unfinished business" until disposed of, to the exclusion of all other business; and thereafter no senator is permitted to speak for more than one hour altogether on the measure itself, or on its amendments, or on motions relating thereto. Furthermore, no amendments may be presented, except by unanimous consent; no dilatory motions or amendments are in order, and all points of order are decided by the chair without debate.

Closure rule of 1917

While it can thus be seen that there are important and even fundamental differences in the organization of the two branches of Congress, there are, at the same time, numerous points of similarity. The same dual party system, for example, appears in both houses, giving color and character to the entire organization and to much of the procedure. Each house has its elaborate system of committees, not a few of them bearing the same names in the two branches. The most important Senate committees[2] are the finance committee, which corresponds to the House committee on ways and means; the committee on foreign relations, to which are referred all treaties and all presidential nominations to posts in the diplomatic and consular service; the judiciary committee, to which are referred nominations to judgeships and to other positions connected with the federal courts; and the committee on interstate commerce, whose work relates to railroads, to telegraph, telephone, pipe-line, and express companies, and to anti-trust legislation. Until very recently, Senate committees were more numerous than House committees, and many were quite as useless as

Similarities in Senate and House organization

Senate committee system

[1] *Senate Manual*, 25-26, Rule XXII; *Amer. Polit. Sci. Rev.*, XI, 372 (May, 1917).

[2] For a complete list of the committees and the committee assignments of senators see *Congressional Directory*, 67th Congress, 2nd session (1921), 181-194.

some of the latter; the committee on transportation routes to the seaboard, for example, not having had a meeting for more than forty years. But this particular committee, along with upwards of two score others, was lopped off in April, 1921, when the Senate committee list underwent a pruning which reduced the total number from seventy-four to thirty-four.[1] Seven of the present number hold regular weekly meetings; the others meet at the call of the chairman. In size, Senate committees run from three members up to sixteen and seventeen in the case of the most important ones; and committee positions are divided between the two parties in about the same ratio as in the House.

How committees are made up

The method of making up committee assignments in the Senate is substantially the same as that followed in the House. Each party caucus appoints a committee to distribute committee positions, including chairmanships, and when these committees complete their work it is approved by the caucuses and then reported to the Senate for formal ratification.

For some years there was much criticism of the Senate committee system, even among senators themselves, due to the fact that the chairmen or ranking members of a few important committees were able to exert a disproportionate influence upon legislation because of the rule which required their appointment to the conference committees that adjust most of the differences arising over measures passing the two houses in dissimilar form.[2] In the Sixty-fifth Congress, for example, one hundred and five conference committees were appointed, and five senators served on eighty-two of them; Senator Smoot served on thirty-three; Senator Warren, on twenty-three; Senator Nelson, on eleven; Senator Lodge, on nine; and Senator Penrose, on six.[3] This situation was remedied to a degree in 1919, when a rule was adopted forbidding any senator to be chairman of more than one of the ten most important committees or a member of more than two such committees.[4] Except as modified by this regulation, the seniority rule holds sway in the Senate to practically the same extent as in the House.

The majority party in the Senate also has a steering committee, which functions in much the same manner as the corresponding

[1] *The Searchlight*, V, 6-8 (Apr., 1921).
[2] *Ibid.*, IV, 9-10, 23-26 (June, 1919).
[3] *Amer. Polit. Sci. Rev.*, XIV, 75-76 (Feb., 1920).
[4] These committees are appropriations, agriculture, commerce, finance, foreign relations, interstate commerce, judiciary, military affairs, naval affairs, and post-offices and post-roads.

House committee, although it is less formally constituted. The Senate likewise has its body of printed rules, and its parliamentary precedents; and it falls back upon Jefferson's "Manual" to a greater extent than does the House. The Senate rules are fewer than those of the House, and, being simpler also, are more easily mastered. The subordinate officers of the Senate also correspond very closely to those of the House. The secretary is chosen in the same manner as the clerk of the House and performs similar duties, aided by a staff of upwards of thirty subordinates. There is likewise a sergeant-at-arms, who performs duties which in the House are divided between the sergeant-at-arms and the doorkeeper. Lastly, the Senate has its own postmaster and its own chaplain.

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CHAPTER XXV

CONGRESS AT WORK

In the two preceding chapters attention has been fixed on the composition of Congress and the organization of the two houses for the conduct of business, and presently we shall turn to a survey of congressional functions and powers. Just here, however, it will be useful to bring together some farther facts about the way in which the work of the legislative branch is carried on.

Physical surroundings

The physical setting is not without interest. Both houses have their meeting place in the capitol building in Washington, a vast sandstone and marble structure situated on the brow of a low hill overlooking the city, the winding Potomac, and the heights of Virginia beyond.[1] The House of Representatives occupies a large hall in the south wing of the building; the Senate, moved in 1859 from the room now used by the Supreme Court, sits in a similar but smaller chamber in the north wing. As in legislative halls of continental Europe, though not in England, the seats in each room are arranged in concentric rows, theater-fashion, facing the marble platform on which the presiding officer sits; and deep galleries provide space for many hundreds of spectators. Formerly, the hall of the House of Representatives was fitted with separate desks for the members; and the Senate chamber is still so equipped. But the growth of numbers in the lower branch has made necessary the removal of separate desks (1913) and the installation of benches, after the manner of the British parliamentary halls. So far as practicable, Republican members sit together on one side of the chamber and Democratic members on the other. The seats of individual representatives are assigned, at the beginning of the session, by lot; although in point of fact they are not occupied regularly, and a member entering the hall when business is going on is likely to take any place that happens at the moment to be unoccupied. In the Senate, where there is never a general vacating of places, a newcomer claims for himself any seat that does not

[1] G. Brown, *History of the United States Capitol*, 2 vols. (Washington, 1900-03).

belong to another member and occupies it regularly. The physical equipment of the legislative branch farther includes numerous committee rooms, an immense marble office-building for the members of each house, a library in the Capitol, and the separately housed Library of Congress, which is the largest library in the United States and the third largest in the world.

Time devoted mainly to considering and passing statutes

Each branch of Congress has certain functions which the other does not share; *e.g.*, the confirmation of appointments by the Senate and the preparation of impeachment proceedings by the House. But by far the greater part of the members' time is taken up with the consideration of bills and resolutions which become effective only when adopted, in identical form, by both chambers; that is to say, the two houses spend most of their time working at the same sort of thing. Some of the measures on which they deliberate are designed to make or modify law, in the strict sense of the term; many others are intended, rather, to give directions to the officers of the government, and are therefore properly only administrative orders.[1] But the same machinery is employed for both kinds of measures; the product is indiscriminately termed "statutes;" and so long as we are dealing with matters of procedure the distinction of content has little importance save at one point, namely, in relation to the handling of finance bills.[2]

How, then, does Congress "legislate?" To answer the question, we must briefly trace the successive steps normally taken between the time when a proposal is put into the form of a bill and the final publication of the measure as law.

How measures are introduced

The constitution requires that all bills for raising revenue shall originate in the House of Representatives. Every other kind of measure may make its first appearance in either house; indeed, through its right to amend revenue bills, the Senate may, in effect, originate them also.[3] In England and other countries having a parliamentary, or cabinet, system of government, the ministers, who are themselves, of course, members of Parliament, introduce almost all of the important bills. The ordinary non-ministerial member, knowing that no measure which he introduces is likely, under the rules, to receive attention, rarely becomes the author or sponsor of a bill. In our Congress there are no ministerial members. Bills may be inspired by the president or the head of a

[1] See p. 397.
[2] This aspect is dealt with in a later chapter. See pp. 415-417, 420-424.
[3] See p. 415.

department,[1] but they have to be introduced by a member of one house or the other who, so far as getting a measure formally before Congress is concerned, has no more rights than any other member. Bills are therefore introduced freely, and without limit as to subject or number, by the members indiscriminately. The most important ones, such as tariff and currency measures, naturally emanate from the principal committees. But any member may at any time get a bill or resolution before either house by simply depositing a copy of it, endorsed with his name, in a box on the clerk's table. The process being so simple, the number of bills introduced is staggering—twenty-nine thousand in the lower house and nine thousand in the upper house during the two-year period of a single recent Congress.[2] Many, of course, are pension bills and other such private measures; many are more or less fantastic proposals which some kind-hearted congressman consents to introduce for outside individuals or organizations; relatively few contain genuine possibilities of helpful legislation; and, fortunately, still fewer ever pass.

Reference to committee

All bills introduced, after being numbered and recorded by the clerk, are referred to standing committees. Private bills, *i.e.*, bills having only a local or personal object, are turned over automatically to the committee designated in each case by the introducer. Public bills are sorted out and assigned, according to the rules governing the subject, by the clerk. Sometimes, however, a bill is of such nature that it might be referred with almost equal appropriateness to any one of two or more committees, and in this case, as indeed in all cases of doubt, the speaker decides what shall be done.[3] Sometimes a bill is divided among two or more committees. Occasionally, too, a bill, after being referred to one committee, is recalled and sent to a different one.[4] In any event, a bill, after being referred, is printed and distributed among the members of the House generally.

Committee meetings

Each of the important standing committees has a room in one of the office-buildings constructed for the members of the Senate and House, where a special library and ample stenographic service are provided. The two houses are commonly in session in the afternoon; hence committees regularly meet in the forenoon, and no

[1] See p. 287.

[2] The Sixty-second (1913-15).

[3] To avoid confusion, the process will be described with reference to the House, and only important differences of procedure in the Senate will be noted.

[4] Sections of presidential messages recommending legislation are similarly referred to the appropriate committees.

committee of the House, save that on rules, may, without special permission, hold meetings while the House is itself in session. Most committees have little or nothing to do. But some of them receive scores of bills every session and accordingly find themselves crowded for time. To expedite matters, they create sub-committees to which particular measures are assigned, or even particular sections of the same measure if it is one of exceptional importance, for example, a tariff or currency bill. Like the committee as a whole, these sub-committees contain representatives of both parties, but with the majority party always in control.

Committee hearings

On receiving a bill, a committee has first to inform itself on the measure's contents and probable effects, and then to decide what to do with it. Information is, or may be, obtained in several ways. Investigations may be carried on directly by the committee or a sub-committee. Or the work of some subsidiary congressional committee of inquiry may be drawn upon. Or data may be acquired from investigations made by executive officers of the government at the request of Congress. The principal mode, however, is the holding of hearings, at which almost any person having interests at stake, or having information or ideas to present, can appear, whether he is in favor of the bill or opposed to it. Frequently these hearings give the committee-room the semblance of a court chamber: paid attorneys argue for or against the bill under consideration, and interested persons give testimony, while the committee members listen and perhaps ask questions. On a great tariff bill the hearings may be drawn out through many weeks, the stenographic reports running into thousands of pages of print.[1]

Possible courses of committee action

Notwithstanding a large amount of publicity in the earlier stages of its deliberations, the committee eventually goes into executive session and reaches its conclusions in secret. Any one of several results may follow. It may report the bill unchanged, which is, of course, tantamount to a recommendation of passage. Or it may strike out some sections, add others, or alter the phraseology, and report the measure in this amended form. Or it may frame a bill of its own and present it as an alternative. In all of these cases, the report is likely, although by no means certain, to lead to favorable action by the House, especially if the committee, or even the majority quota if the subject be of a partisan nature,

[1] Since 1915 a legislative reference service has been maintained in the library of Congress for the assistance of members studying legislative projects, especially in committee deliberations. See *Amer. Polit. Sci. Rev.*, IX, 542-549 (Aug., 1915).

CHAP. XXV

has come to its decision by a unanimous vote. The committee has, however, one other possible course of action: it may make no report at all, or, in other words, may "pigeonhole" the bill; and this is the fate which befalls the great mass of measures introduced.[1] The decision to make no report may come after, and as a result of, investigations and hearings. But most frequently a measure which does not strike the committee offhand as promising or important is simply ignored from the outset and has not the minutest chance of ever occupying the time of the committee members, much less that of the House itself. Since 1910 it has been possible, under a revised rule, for a majority of the House to call up a bill after it has been in a committee's possession as long as fifteen days. But this is very seldom done, and for all practical purposes any bill can be killed in its initial stage by simple failure of the committee having it in charge to report. Save for the rigorous sifting of bills which arises in this way, the House would be hopelessly swamped with work, and it would become necessary to place severe restrictions upon the number of measures that members may introduce.[2] Occasionally a committee fails to report a worthy bill merely because of the prejudices of its majority members on the subject. But most measures that come to their end in this manner deserve no better fate.

The calendars

A reported bill goes back to the clerk of the House and is placed on one of the three "calendars," which means that it is before the House for consideration as soon as it can be reached. If it is a revenue bill, a general appropriation bill, or a public bill directly or indirectly appropriating money or property, it goes on the calendar of the Whole House on the State of the Union, commonly known as the Union Calendar. If it is a public bill not directly or indirectly appropriating money or property, it goes on the House Calendar. If it is a private bill, it finds a place on the calendar of the Committee of the Whole House, sometimes

[1] Of 9,775 bills and resolutions introduced in the House during the first (special) session of the Sixty-Seventh Congress (April 11 to November 23, 1921), only 415 were reported by committees. Similarly, of 3,103 bills and resolutions introduced in the Senate, 320 were reported.

[2] The system has its obvious advantages and disadvantages. It affords an easy method for presenting matters of real importance, and it saves time in the introduction of business, but it permits the bringing forward of all sorts of "half-baked measures and sensational bills, which are sometimes published widespread throughout the country and excite unnecessary alarm among those who take them seriously and who would be especially affected by the proposed legislation." S. W. McCall, *The Business of Congress*, 46.

called the Private Calendar.[1] Theoretically, bills are called up in the order in which they appear on these calendars or lists, but in practice they are frequently, indeed usually, considered out of their turn.

Order of business in the House

For it must not be supposed that all bills that find their way to one of the calendars are actually taken up, debated, and voted on. With sixty-odd different committees, of which at least twenty are very active, reporting bills, the calendars soon grow congested, and only a small proportion of the measures listed can be given attention. The problem is to sift out the bills most deserving of consideration, and especially to ensure opportunity for the proper disposal of great and essential measures such as the general appropriation bill of the year. This end has been attained through the development of an order of business which is regular, yet also flexible. Normally, the business of the House on any given day proceeds as follows: (1) the speaker calls the House to order; (2) the chaplain offers prayer; (3) the journal of the previous day's proceedings is read and approved; (4) reference of public bills is corrected; (5) business "on the speaker's table," *i.e.*, presidential messages, bills with Senate amendments, and other matters which await the speaker's presentation to the House, is disposed of; (6) "unfinished" business, which is the business on which the House was engaged at the time of adjournment, is completed; (7) the "morning hour"—which, in point of fact, continues indefinitely until a motion brings it to an end—is devoted to the consideration of general bills called up from one of the calendars by committees which have reported favorably on them; (8) if time allows, the House goes into committee of the whole to discuss revenue or appropriation bills on the Union Calendar, or, if none such are pending, other public bills listed on the House Calendar.

Departures from the regular order

This order is, however, subject to interruption at almost any stage, and in a great variety of ways. In the first place, certain days are set aside for the consideration of particular kinds of measures, *e.g.*, the second and fourth Mondays of each month for business relating to the district of Columbia, and every Friday for bills on the Private Calendar. Again, at any time after the journal is read, it is in order, by direction of the appropriate committees, to move that the House go into the Committee of the Whole House

[1] These calendars were established in their present form in 1880, although the first and third existed for some time before that date.

CHAP. XXV

on the State of the Union to consider revenue or general appropriation bills. Certain committees, too, have the privilege of reporting at any time, *e.g.*, those on ways and means, appropriations, elections, and rules, and—what is more important—securing immediate consideration for their reports. Finally, by a two-thirds vote, the House can suspend the rules and depart as widely as it likes from the regular procedure, even to the extent of passing a measure through all stages at a single vote.[1] Under these circumstances the process of legislation in the House has been aptly likened to the running of trains on a single-track railroad. "The freight gives way to a local passenger train, which sidetracks for an express, which in turn sidetracks for the limited, while all usually keep out of the way of a relief train. Meanwhile, when a train having the right of way passes, the delayed ones begin to move until again obliged to sidetrack."[2] The order of business—which represents a long development from simple days when there was time enough for the handling of all business that was offered—is useful as a general program or guide; but, to permit vital matters to be got at promptly and disposed of expeditiously, it is necessary to enable it to be interrupted or suspended easily, so long, of course, as the matters for which the interruption takes place are really important.

Committee of the whole

Mention has been made of the Committee of the Whole; and inasmuch as the sessions of this committee occupy the greater part of the time of the House, something more ought to be said about it. In reality, there are, as has appeared, two Committees of the Whole: (1) the Committee of the Whole House, which considers private bills, and (2) the more important Committee of the Whole House on the State of the Union, which handles public bills for raising revenue and for appropriating money or property. Both are, of course, simply the House of Representatives in another form. The House, on motion of a member, votes to resolve itself into the Committee of the Whole for the consideration of private bills or of a designated public bill; the speaker yields the chair to a special chairman whom he designates; one hundred members constitute a quorum, instead of the majority required when the House is in

[1] Ordinarily this two-thirds rule operates as a safeguard of the rights of the minority. But it loses this character when, as in the Congress elected in 1920 (the Sixty-seventh), one party has a majority so great that the rules can be suspended by its members acting independently.

[2] D. S. Alexander, *History and Procedure of the House of Representatives*, 222.

regular session;[1] any measure or matter that has been referred to the committee may be taken up; debate proceeds, very informally, under a rule allowing only five minutes to each speaker at a time, unless with unanimous consent; there are no roll-calls, and divisions are taken only by a rising vote or by tellers; and when the consideration of a measure is completed the committee votes to "rise," the speaker resumes the chair, the mace (the symbol of the speaker's authority) is restored to its place on the marble pedestal at the right of the chair, and the chairman of the committee reports the action taken, with any amendments which may have been recommended. The House must, of course, act upon the committee's report to give it effect.

This device, whose origins are traceable to the Stuart period of English history, has proved exceedingly useful. It enables all finance bills to be considered in committee, yet under such circumstances that every member of the House can have a voice in the proceedings. It permits great numbers of amendments to be presented, explained, and disposed of expeditiously. It prompts rapid-fire, critical debate which, as a rule, shows the House at its best. And the absence of recorded ayes and nays invites members to speak their sentiments free from the restraint which published votes sometimes impose.[2]

The three readings

Under a rule which in substance dates from the first Congress, every bill or joint resolution, in order to be passed, must have three readings. The first reading is by title only. The second is a reading in full, with opportunity for the offering of amendments; and this is followed by a vote on the question, "Shall the bill be engrossed and read a third time?" If this stage is passed successfully, the third reading takes place, by title only unless, as rarely happens, a member demands a reading in full. Then—after engrossment—and only then, comes the vote on the measure's final passage. If the result is favorable, the bill or resolution is ready to be sent to the Senate.

Closure

As a rule, debate takes place only on the question of ordering a bill to a third reading, although, if not cut off by the "previous

[1] The difficulty of holding a quorum, and the enormous waste of time consumed by roll-calls, has led to the suggestion that fifty be made a quorum. It is of interest to note that even in the regular sittings of the British House of Commons forty is a quorum.

[2] D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. XIII.

CHAP. XXV

question," it may be renewed on the question of final passage. When a measure reaches the stage at which it can be discussed on the floor, the chairman (or other designated representative) of the committee which has reported it favorably speaks in its behalf, being followed by a minority member of the committee if, as is usually the case, the report has not been unanimous. Other members of the committee speak alternately for and against the bill, and finally members of the House who do not belong to the committee are recognized. A rule dating from 1841 forbids a member to speak for more than an hour, except with unanimous consent. Even so, debate would tend to be interminable but for certain devices by which it can be brought to a close, chiefly (a) advance agreements on the length of time it shall be allowed to run and (b) what is known as the "previous question." At any stage of the discussion any member of the House may "move the previous question;" and if the motion carries, a quorum being present, debate is ended and a vote is forthwith taken on the question which has been under consideration, although if there has as yet been no debate at all, the speaker is required to allow a debate lasting forty minutes.

Checks on obstruction

Formerly, opponents of pending bills employed all manner of expedients to kill time and prevent action: dilatory motions were made; unnecessary roll-calls were forced; efforts were put forth to stop proceedings by leaving the House without a quorum; time-consuming amendments were offered; and as a result a great part of the time of the House was wasted. Rulings of strong speakers, however, reinforced with specially devised House regulations, have greatly reduced the effects of these forms of obstruction. One rule, for example, growing out of an historic action of Speaker Reed in 1890, stipulates that "no dilatory motion shall be entertained by the speaker." Another authorizes the presence of a quorum to be established, if the question is raised, by a count by tellers rather than by a tedious roll-call.

Methods of voting

Upon conclusion of the consideration of a bill or resolution, or an amendment thereto, a vote is taken. In regular sittings of the House four, and in Committee of the Whole three, modes of voting are used. The first, and most common, is a division by simple sound of voices, *i.e.,* a *viva voce* vote. If any member is dissatisfied with the announced result of this, he may demand a rising vote; whereupon the supporters of each side of the question are counted. Again, if one-fifth of a quorum demands it, a vote is taken by

teller: a teller is designated for each side; the two take their places in front of the speaker's desk; the members in favor of the measure pass between them and are counted, and then those opposed; and the result is declared by the tellers and announced by the chair. Or, finally, if one-fifth of those present demand it, the yeas and nays are ordered: the clerk calls the names of the members, who respond with "yea" or "nay"; these individual votes are recorded; and the result is duly announced. The yeas and nays may be demanded before any of the other methods has been employed, and, if ordered, are taken forthwith. But it must be noted that this form of voting is used only in regular sittings of the House, never in Committee of the Whole. Attempt was formerly made to compel all members present to vote, but this has been given up as impracticable.[1]

Procedure in the Senate

After a bill is passed in the House it is certified by the clerk and carried by him to the Senate chamber, where it is received by the presiding officer and referred to the appropriate committee. Space forbids us to describe in detail the process by which the Senate legislates. But it is happily unnecessary to do so because, speaking broadly, the course of procedure is not very different from that already outlined in connection with the House. A bill —whether originating in the upper house or sent over from the other end of the Capitol—is, as has been said, referred to one of the standing committees; if regarded favorably, it is reported; if reported, it is placed on a calendar, from which it may be called up out of its turn; three readings must be passed, the third one, at which amendments are offered, being the critical test; members are put on record by the yeas and nays as in the lower house; and as a result the bill may be adopted as it stands, adopted with amendments, or defeated.

Differences between Senate and House procedure

There are, however, some important differences between Senate and House procedure. For one thing, not only revenue bills and bills involving a charge upon the treasury, but all bills, are considered in the Senate in Committee of the Whole, yet without a change of presiding officers. In the second place, there is no privileged business in the Senate, so that the order of the calendar is followed automatically unless by unanimous consent or a majority vote otherwise.[2] More important still is the Senate's lack of

[1] The stages in the enactment of a bill by the House are set forth officially in *House Manual and Digest*, 66th Cong., 3rd Sess. (1921), 437-440.

[2] In practice, appropriation bills enjoy a certain priority.

CHAP. XXV

restraint upon debate. There are no rules limiting the length of speeches; a senator may speak, too, as often as he likes, subject only to the restriction that he may not, without consent, speak more than twice on the same question in a single day; the previous question, which was employed in earlier times as in the House, has been abolished. As a result, greater freedom of debate prevails in the Senate than in any other important legislative body in the world. The comparatively small number of members has made this possible; and it cannot be denied that the liberty enjoyed has some real advantages. The knowledge that debate will not be cut off as long as any member has anything to say stimulates discussion and encourages the consideration of measures from all angles; and minorities are protected in a manner quite unknown in the lower house.

Obstruction in the Senate

However, liberty is here as elsewhere sometimes abused. Again and again freedom to talk at any length has been taken advantage of, not to throw light on the subject under discussion or to convert the opposition, but to delay, and perhaps prevent, action. A small group of members, indeed even a single member, can arbitrarily hold up the body's proceedings almost indefinitely, especially when a session is approaching an end, and can in this way defeat a measure which is generally favored or force a decision which is almost unanimously disliked. For example, in 1903 a senator, near the close of a session, compelled provision to be made for a claim of his state which had been pending almost three-quarters of a century by announcing his purpose, unless this were done, to hold the floor of the Senate until the moment of expiration and thereby to prevent essential appropriation bills from being passed. Almost every session sees the defeat of some measures by "filibustering" tactics of this character.

The armed merchant-ships filibuster

In 1917 a specially notorious filibuster led, indeed, to the adoption of a mild form of closure. By defeating a bill authorizing the arming of American merchant-ships, at a time when our difficulties with Germany were nearing a crisis, a small band of senators created a situation declared by President Wilson to be "unparalleled in the history of the country, perhaps in the history of any modern government." "In the immediate presence of a crisis," . . . the President went on to say, "the Congress has been unable to act either to safeguard the country or to vindicate the elementary rights of its citizens. More than five hundred of the five hundred and thirty-one members of the two houses were ready

and anxious to act; the House of Representatives had acted, by an overwhelming majority; but the Senate was unable to act because a little group of eleven senators had determined that it should not. . . . The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of wilful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible. . . . The only remedy is that the rules of the Senate be so altered that it can act."[1]

Closure rule (1917)

Convoked in special session immediately after this occurrence,[2] the Senate adopted by a decisive vote a rule providing that, on petition of sixteen senators, supported two days later by a two-thirds vote, a date may be fixed for the closing of debate on a measure, each senator being limited during this period to a single speech of one hour, and no amendments being allowed except by unanimous consent. In point of fact, this procedure has been brought to bear only once or twice, and in practice freedom of debate still knows very little restriction. Demand for an effective closure, however, continues; and a way may yet be found to end the tyranny of Senate minorities without robbing the chamber of the deliberative aspect which has been its chief boast.[3]

Disagreements between the houses

A bill which passes both branches of Congress in identical form is sent to the president and becomes law if it receives his signature. The Senate may, however, amend a House bill, and the House may amend a Senate bill; and, except in the rare event that the first body forthwith accepts all of the amendments added by the second one, a conference must be held with a view to smoothing out differences. No measure can become law unless every part and feature of it has been concurred in at both ends of the Capitol. The means employed to bring the houses into agreement is the appointment of a conference committee, the initiative being taken by the house that has in hand the bill and the papers pertaining thereto. This house invites the other one into conference, and the committee is composed of three "managers" formally designated from each house by the presiding officer thereof, and almost invariably consisting in each case of the chairman, the next ranking majority member, and the ranking minority member of the com-

[1] *Amer. Yr. Book* (1917), 5.

[2] The filibuster immediately preceded the close of the Sixty-fourth Congress on March 4, 1917.

[3] A resolution was introduced in the Senate in 1921 providing for invocation of closure by a majority, instead of a two-thirds, vote.

mittee having the bill in charge. The House frequently instructs its conferees; the Senate never does so, and is strongly opposed to the practice. The conferences are held in the room of the Senate committee having jurisdiction of the bill.

Work of conference committees

The task before a conference committee may be easy or difficult. The house which last considered the given bill may have introduced but few and not highly contentious amendments; and by simple process of give and take the conferees may speedily come to a report which the two houses can accept. On the other hand, scores, and even hundreds, of alterations may have been made, and indeed the whole of the bill following the enacting clause may have been dropped out in favor of a new bill. Even in revenue legislation—despite the constitutional provision that all bills for raising revenue shall originate in the House—the Senate sometimes goes this far, as for example, in considering the Tax Revision Bill passed in 1921, when it wrote an entirely new law, in the form of eight hundred and thirty-three amendments to the House bill. Sometimes a conference committee's work is soon over; sometimes weeks of hard labor are entailed. If no agreement can be reached, the bill fails—unless another joint committee is appointed and is more successful. But with rare exceptions a consensus is arrived at; and with almost equally rare exceptions the reported bill is accepted by both houses. As a rule, the house which has offered the amendments recedes less than the one which originated the bill. Thus in the case of the Tax Revision Act mentioned above, the Senate gave up only seven of its proposals, while the House entirely accepted seven hundred and sixty of them and accepted with qualifications sixty-six more.

Disadvantages of conference committee procedure

In Congress, as in the state legislatures, the conference committee is an exceedingly useful device. It is more necessary than in European parliaments (although it is by no means unknown in them) because, in the first place, our national and state legislatures are organized in accordance with a more extreme bicameral theory than are most foreign legislatures, and, in the second place, because, whereas in cabinet-governed countries the ministers, comprising in a sense a continuous conference committee of the two houses, are able to coördinate the houses' actions, our system of balanced government leaves the legislative houses legally isolated and devoid of coördinating machinery except such as the houses may set up for their own convenience. The machinery employed is, of course, the conference committee. Some questionable fea-

tures, however, appear. Almost without exception, conference committees work in secret. Doubtless it would be difficult for them to make headway otherwise. Yet, in view of the power which they wield, strong objection can be, and is, raised. For while the committee is supposed to deal only with actual differences between the houses and to stay well within the bounds set by the extreme positions which the houses have taken, it often works into the measure as reported many features of its own, even going so far as to rewrite whole sections with the sole purpose of incorporating the views which the majority members happen to hold. Conference committee reports are likely to reach the houses near the close of a session,[1] and, as has been said, are very likely to be adopted. There may be little time for critical scrutiny or debate; anything that the committee reports has a strong presumption in its favor; failure to act might entail embarrassment. In practice, this often means the enactment of important provisions without consideration by either house—in other words, legislation nominally by Congress but actually by conference committee.[2]

Final stages

When a bill has been passed in identical form by both houses it is "enrolled," *i.e.*, written or printed on parchment, and is thereupon signed by the presiding officers and sent to the president. If it is approved, or if it becomes law by simple inaction of the president, it is transmitted to the Department of State, to be deposited in the archives, and also to be duly published.[3] If it is vetoed it goes back to the house in which it originated and becomes law only if, upon reconsideration, it is passed in both houses by a two-thirds majority.[4]

Publicity of proceedings

On the ground that part of its work was of such a nature as to require secrecy, *e.g.*, the consideration of treaties, the Senate at first sat exclusively behind closed doors; and even the House of Representatives occasionally kept the public from hearing its deliberations. Strong objection, however, arose, and in 1793 the Senate adopted the wiser plan of opening its doors whenever engaged in ordinary legislative business and closing them only during "executive" sessions. The last secret session of the House

[1] Under the rules, they are highly privileged, especially in the House of Representatives, where they may be presented at any time when the journal is not being read or a vote taken.

[2] L. Rogers, "Conference Committee Legislation," *No. Amer. Rev.*, CCV, 300-307 (Mar., 1922); D. S. Alexander, *History and Procedure of the House of Representatives*, 284-285.

[3] G. Hunt, *The Department of State*, Chap. XI.

[4] See p. 277.

CHAP. XXV

was held not long afterwards, in 1811. In executive session the Senate has to do chiefly with treaties and nominations to public office submitted by the president—matters on which it acts, not strictly as a branch of the legislature, but as an executive council. Privacy is therefore quite logical and defensible. In point of fact, the public soon comes to know what is done, and even much of what is said; for although the officers are sworn to secrecy and the members are presumably bound in honor not to give out information, enterprising press correspondents usually contrive to follow the proceedings quite closely.

Published records

The constitution requires both houses to keep a journal and to publish it "from time to time."[1] The journals are, however, bare records of bills introduced, reports presented, and votes taken —that is, minutes of official actions, not records of debates. For a long time debates were not reported, except in a haphazard way in some of the better newspapers. In 1833, however, the "Congressional Globe," giving the debates verbatim, was started as a private venture; and in 1873 the present "Congressional Record," prepared by officers of Congress and printed by the government, was established. The Record purports to give an exact stenographic account of everything that takes place on the floor of the two houses—save, of course, during executive sessions of the Senate. This it does not actually do, because members sometimes edit their remarks in such a way as to make important changes in them, and because, in the case of the House, speeches are frequently printed, under special leave, which were never delivered by word of mouth at all. The Senate does not permit the latter practice, but it is quite as liberal as the House in allowing members to get into the Record magazine articles, documents, and even large portions of books, which have not been read in debate. In many cases these extraneous materials, especially the House speeches, are designed to be sent out in quantities, under the government frank, for use in the member's campaign for re-election.

Impeachment

Practically all of the time of the House of Representatives is devoted to the consideration of bills, resolutions, and reports, and the Senate is almost exclusively occupied with this same sort of work, together with the confirmation of appointments and the discussion of treaties. Occasionally, however, it falls to both houses to have some part in a proceeding of a very special character, namely, impeachment. The constitution endowed the president and Senate

[1] Art. I, § 5, cl. 3.

with extensive powers of appointment. But how was an unfit officer to be got rid of if he could not be induced to resign? We know now that the power to appoint came to be construed to involve the power to remove. But this development could not definitely be foreseen by the constitution's makers; besides, the president or other appointing officer might be lax about making desirable removals. The judges were to hold office during good behavior. But how could they be severed from their positions if their behavior ceased to be good? How should the president himself, in case of remissness, be made to turn over his office to a successor?

The constitutional provision

The answer lay ready at hand in the historic English device of impeachment. To be sure, the growth of cabinet responsibility was already making impeachments unnecessary in the mother country; and the practice there is now obsolete. But the makers of our constitution saw no better mode of protection against abuse of power or other serious official misconduct. Hence they wrote into the document the provision that "the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."[1] Provisions for the impeachment of state officers likewise early found their way into most state constitutions.

Who can be impeached

Under the clause cited, only civil officers are subject to impeachment; military and naval officers are liable to trial by court-martial, but cannot be impeached. Members of Congress, furthermore, although civil officers, are commonly considered to be exempt; there is some warrant, indeed, for regarding them as state officers rather than as federal officers. The grounds for impeachment are stipulated as clearly, perhaps, as is possible. Bribery is self-explanatory, and treason is defined by the constitution.[2] "High crimes and misdemeanors" is a flexible phrase, but one which has uniformly been construed to include only offenses of a grave nature involving something more than mere inefficiency or partisanship.

Impeachment procedure

The process of impeachment can be stated briefly. It starts in the House of Representatives, where, upon charges being made against a given official, a committee is appointed to investigate. The committee reports to the House, and if, upon consideration of the findings, the majority so votes, the charges, in the form of "articles of impeachment," are sent to the Senate and a committee of "managers" is designated to conduct the trial. The Senate has no option but to hear the case. It furnishes the accused with a copy of the

[1] Art. II, § 4. [2] Art. III, § 3, cl. 1.

CHAP. XXV

charges against him, fixes the date for the trial to begin, and when the time arrives converts itself into a court, under the chairmanship of its regular presiding officer unless the president of the United States is on trial, in which case the chair is occupied by the chief justice of the Supreme Court. The accused is allowed counsel, and he may appear and give testimony in person; and witnesses, for and against him, are brought in and questioned. At the close of the proceedings, which may last through many weeks, the public is excluded and the Senate votes. Two-thirds convicts; anything less acquits. The penalty, in case of conviction, is removal from office, to which may be added disqualification for ever holding "any office of honor, trust, or profit under the United States"; and the president's power of pardon and reprieve does not apply. Once retired to private life, furthermore, the convicted person may be proceeded against in the ordinary courts like any other person if he has committed an indictable offence.

Past impeachment cases

In the entire history of the country impeachment proceedings have been brought against only nine federal officers, and only three have been convicted. On charges arising mainly out of alleged violations of the Tenure of Office Act passed over a veto in 1867, President Johnson came within one vote of being convicted in 1868. But the effort failed, as did the attempt to impeach William W. Belknap, secretary of war, in 1876. All of the three officers convicted belonged to the judiciary. Two of them were district judges; one, tried in 1913, was a judge of the now defunct Commerce Court.[1]

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CHAPTER XXVI

THE POWERS OF CONGRESS: GENERAL VIEW

A prevalent misconception

"No misconception in respect to the organization of the state and of the functions of the various parts of its governmental machinery," says an American political scientist, "is more prevalent than that the national assembly—the parliament, the congress, the legislative chambers, as the case may be—is simply, or primarily, a body for the formulation and passage of general laws for the determination of the rights and duties of the citizen body for which it acts. The enactment of public laws of this character is undoubtedly one of its functions, and, it need scarcely be said, an exceedingly important one. That it is not its sole function, indeed is not the one making the largest draft upon its time, is at once apparent if an attempt is made to analyze the work really done by it."[1]

Functions of Congress

This statement is no less true of the Congress of the United States than of the legislature of Pennsylvania or Ohio, on the one hand, or the Parliament of Great Britain, France, or Italy, on the other. Congress is, indeed, a law-making body. But it is far more than that; its readily distinguishable functions (exercisable by one house or both) are at least six in number: (1) constituent, (2) electoral, (3) executive, (4) judicial, (5) supervisory and directive, and (6) legislative—an enumeration which of itself is sufficient to indicate that Congress, like the presidency, although established with a view to a separation of powers, deviates from that principle in its actual powers and workings at almost every turn.

1. Constituent

Several of the functions named above have been sufficiently considered in earlier portions of this book, and are but mentioned here in order that the actual range and diversity of congressional activities be not lost to view. In describing the modes by which the national constitution is amended, we saw that, while Congress cannot itself under any circumstances make a change in the fundamental written law, no alteration thereof can be brought about without congressional action. Congress prescribes whether pro-

[1] W. F. Willoughby, "The Correlation of the Organization of Congress with that of the Executive," *Amer. Polit. Sci. Rev.*, Suppl., VIII, 155 (Feb., 1914).

CHAP. XXVI

posed amendments shall be ratified in the states by the legislatures or by conventions; it may call a national convention to formulate amendments on application of the legislatures of two-thirds of the states; in point of actual practice, it first adopts all proposed amendments and then puts them before the states for action.[1] In

2. Electoral

considering the mode of electing the president and vice-president we have seen that Congress acts as a board to canvass the electoral vote and declare the results, and that in case of the lack of an electoral majority the House of Representatives chooses the president from the three candidates having the largest number of votes, and the Senate similarly chooses the vice-president from the two candidates standing highest.[2] We have seen that, while the Senate did

3. Executive

not develop into a general executive council on the lines at one time anticipated by Washington, it shares with the president, by express constitutional provisions, the executive functions of appointment and treaty-making.[3] Finally, we have observed that

4. Judicial

the House of Representatives is entrusted with the duty of examining charges preferred against the president, vice-president, and other civil officers of the United States, and of determining whether grounds exist for impeachment; that to the Senate is given the duty of trying all officers impeached; and that, therefore, one branch of Congress serves, within this particular domain, as a public prosecutor and the other as a high court of justice.[4]

5. Supervisory and directive

Two of the six functions enumerated above remain, namely, legislation and administrative supervision and direction. It has not been customary, even in Congress, to recognize these as two separate things; and the distinction cannot, without indulging in a species of pedantry, be carried consistently through the account of congressional activities which follows. Nevertheless, the difference ought to be noted; it is intrinsically important, and more will undoubtedly be made of it in the future than in the past. "Examination of the work of any legislative body," continues the author quoted above, "reveals the fact that the great bulk of its activities has to do with such matters as the determination, subject to constitutional limitations, of how the government, and particularly the administrative branch of the government, shall be organized, what work shall be undertaken, how such work shall be performed, what sums of money shall be applied to such purposes, and how this money shall be raised and disbursed. From this

[1] See pp. 210-211. [2] See pp. 248-251. [3] See pp. 256-267.
[4] See pp. 392-394.

standpoint the legislature is the board of directors of the public corporation. Representing and acting for the citizen stockholders, it is its function to give orders to administrative officers; and, as a correlative and necessary function, to take such action as will enable it at all times to exercise a rigid supervision and control over the latter with a view to seeing that its orders are properly and efficiently carried out. Manifestly this function is quite distinct from that of acting as a law-making body, strictly speaking. It is unfortunate that the same designation, 'laws' or 'statutes,' is given to both classes of documents through which the action had is set forth. Laws from the juristic standpoint have to do with the formulation and enactment of general rules of conduct to govern the relations between individuals and between individuals and the government. They have to do with rights and duties and the means of their enforcement. They are intended to be general and permanent. Enactments for the purpose of giving directions to officers of the government are for the most part but administrative orders. The major part of them have only a temporary end in view."[1]

Illustrations

When Congress passes a measure regulating commerce among the states, or extending citizenship to the inhabitants of Porto Rico, or forbidding paupers to be admitted to the country, or prescribing punishments for counterfeiting the securities or current coin of the United States, it is making laws, in the proper sense of the term. When it authorizes the construction of a bridge or a public building, lays a tax on incomes, establishes a consulate at Aden, appropriates money for a national bureau of efficiency, or prescribes how immigrants shall be inspected, it is really only making rules or arrangements of a business or administrative character. And the point to be impressed is that it is this latter sort of thing that absorbs the major part of the time and energy of the two houses. The greater part of the law under which we live was never made by Congress; much of it indeed, was never made by any legislative body at all.

To a remarkable extent—to a far greater extent, as has been pointed out, than the English Parliament—Congress concerns itself with the organization, procedure, and activities of the executive and administrative organs and agencies of the government, creating and abolishing offices, starting new lines of activity, raising money, allotting funds to departments and enterprises, receiv-

[1] W. F. Willoughby, *Government of Modern States*, 301-302.

CHAP. XXVI

ing reports, making investigations, issuing rules, criticizing and admonishing,—in short "running the government," very much as (to advert to Dr. Willoughby's comparison) a board of directors runs a great business organization. In performing this function the two houses use the same machinery and act in the same way as in making laws. But the nature of the work done is different in the two cases, and something would be gained if the rules of organization and procedure were shaped in accordance with this fact.

6. Legislative

Without attempting to hold rigidly to the foregoing narrow and exact definition of the legislative function, we may now turn to consider the status which Congress occupies in our system as a law-making body. The first thing to be observed is that whatever law-making power the national government possesses belongs to Congress: "all legislative power herein granted," says the constitution, "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.[1] Not only is all national law-making power thus conferred on Congress, but that body cannot, under the wording of this provision, delegate its legislative authority to the president or to any other branch or organ of the government. This does not mean, however, that it may not authorize the president to decide when a certain law shall go into effect, or that it may not establish by law some general rule or principle and then empower the president or some administrative board to apply the rule to special cases as they arise. Some problems, like those connected with the fixing of freight and passenger rates in interstate commerce, are so complicated that Congress long ago gave up the attempt to solve them by exact and detailed legislation. In the case mentioned, it was, for example, prescribed that all rates should be reasonable, and an expert body, the Interstate Commerce Commission,[2] was created upon which was devolved the duty of determining the reasonableness or unreasonableness of rates in specific cases. Under similar circumstances, power of applying general law has been conferred upon the Federal Trade Commission and various other administrative bodies.[3] The restraint of Congress from delegating its strictly legislative powers is such, however, as to make it impossible for the two houses to authorize a nation-wide referendum, should they care to do so, as a means of determining acceptance or rejection of a measure;

[1] Art. I, § 1, cl. 1. [2] See p. 447. [3] See p. 452.

without a constitutional amendment, Congress cannot delegate its legislative power even to the whole people.[1]

Restricted scope of congressional power

In the second place, it is to be observed that Congress does not have full and unrestricted legislative power, like the English Parliament, but only "all legislative power *herein granted*;" in other words, every exercise of legislative power by Congress must be based upon some authorization in the constitution. When, therefore, certain legislation is proposed or demanded, its advocates must be able to point to some clause of the constitution which, either expressly or by fair implication, grants the necessary authority. On the other hand, if the opposition can show that there is no constitutional sanction, it will be useless for Congress to enact the proposed measure; for the Supreme Court, which is the final judge of congressional powers, will be practically certain to find that Congress has exceeded its authority, and that, accordingly, the supposed statute is void. This restricted scope of congressional power easily explains why debates on the constitutionality of proposed laws occupy so much time and attract such wide attention in connection with congressional proceedings.

Express and implied powers

Upon many matters there can be no question as to congressional legislative power, for the reason that power has been conferred in definite and unmistakable terms. This is true of a long list of subjects enumerated in the eighth section of Article I, including, for example, currency, patents, copyrights, bankruptcy, taxation, and the regulation of foreign and interstate commerce. On many subjects, however, the authority of Congress to legislate is not clear, and, if possessed at all, must be derived by implication or inference from some of the powers which are granted in express terms. That legislative power may be derived in this manner, the constitution itself practically asserts in the "implied powers" clause, which gives Congress authority to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly vested by the constitution in Congress or in any branch of the government.[2] Likewise, four of the last seven amendments expressly state that Congress shall have power to enforce them by "appropriate legislation."

It has been the sharp differences of opinion over what measures might and what ones might not fairly be deemed "necessary and

[1] E. McClain, *Constitutional Law in the United States*, 62.
[2] Art. I, § 8, cl. 18.

Liberal interpretation of congressional powers

proper," or "appropriate" for carrying into effect the enumerated powers of the national government, that has made the powers of Congress "the great battle-ground of the constitution." "Around them have surged the legal combats of strict and broad construction, of tariff and taxation, of nullification, of secession, of the currency, and finally, of commercial regulation and corporation control."[1] The Supreme Court early adopted a very liberal interpretation of these phrases, to this general effect: if it can be shown that Congress has been given authority to deal with any specified subject, then in exercising that authority Congress is free to select any means or instrumentalities whatsoever which are not prohibited by the constitution and which are appropriate and consistent with the letter and spirit of that instrument.[2] Furthermore, whether a given law is "necessary," within the meaning of the constitution, is a question for Congress alone to decide; the courts will not inquire into the degree of the alleged necessity. Illustrations of laws passed under implied grants of legislative power include the acts which established the Bank of the United States in 1791 and in 1816, and created the national banking system during the Civil War; the laws authorising the issuance of "greenbacks," and making them legal tender in the payment of debts, and, more recently, the act creating the federal reserve system; acts establishing the postal savings and parcel post systems; and the great variety of measures based on authority implied from the power to regulate foreign and interstate commerce, *e.g.*, acts fixing the rates and regulating the services of express, telegraph, telephone, and pipe-line companies, acts concerning safety appliances and workingmen's compensation, and the pure food and drugs act.

Resulting powers

Moreover, the scope of congressional authority has been considerably widened by decisions of the Supreme Court which have held that it is not necessary for Congress to trace back every one of its powers to some single grant of authority, direct or implied, but that authority may be deduced from more than one of the specified powers or from some or all of them combined.[3] Powers derived in this way are commonly called "resulting powers." The criminal code of the United States is a good illustration: the constitution gives the national government express power to punish only four crimes, *i.e.*, counterfeiting the securities and coin of the

[1] J. T. Young, *The New American Government and Its Work*, 94.

[2] McCulloch *v.* Maryland, 4 Wheaton, 316 (1819).

[3] Cohens *v.* Virginia, 6 Wheaton, 264 (1821); W. W. Willoughby, *Constitutional Law of the United States*, I, 64-66.

United States, felonies committed on the high seas, offenses against the law of nations, and treason; but Congress unquestionably has the power to punish the violation of any national law and to protect prisoners in its custody, although such powers are neither expressly granted nor inferable from any single express grant in the constitution. Similarly, from the premise that in all matters pertaining to international relations the United States appears as a single sovereign state, and upon it rests the duty of meeting all its international responsibilities, has been deduced the power of Congress to punish the counterfeiting in this country of the securities of foreign states, to annex by statute unoccupied territory, and to establish judicial tribunals in foreign countries.

Federal "police powers"

In recent years the phrase "federal police power" has come into common use, and it calls, in this connection, for brief explanation.[1] The police power has been defined as the power to restrict the rights of liberty and property in the interest of the public health, safety, morals, or general welfare. No such general police power is conferred upon Congress in the constitution, and the most common instances of its exercise are found in state legislation and municipal ordinances. Such police powers as Congress may be said to have are legally only special or peculiar forms of the exercise of some implied power, in which the protection of public health, morals, safety, or general welfare is prominently involved. These implied powers arise, as a rule, from the power to lay taxes, to establish post-offices and post-roads, or to regulate interstate commerce. Illustrations of powers springing from the last-mentioned source are the safety-appliance act, the employer's liability act, the law limiting the hours of labor of persons employed on interstate carriers, the Adamson eight-hour law, the pure food and drugs law, the statute prohibiting the transportation of lottery tickets by interstate carriers, and the Mann white-slave act.

Permissive and mandatory powers

Most of the powers expressly conferred upon Congress are permissive; that is to say, the two houses are perfectly free to exercise or to refrain from exercising them, in whole or in part. There are, however, some grants of power which are mandatory. For example, it is made the duty of Congess to call a convention of the states to revise the constitution whenever the legislatures of two-thirds of the states so request;[2] likewise to provide for taking the census every ten years,[3] and to make regulations for the carrying of ap-

[1] Willoughby, *Constitutional Law of the United States*, II, 735-745.
[2] Art. V.
[3] Art. I, § 2, cl. 3.

CHAP. XXVI

peals from the lower courts to the Supreme Court.[1] In none of these instances, however, is there any way in which Congress can be compelled to act if it fails to obey the constitutional injunction; neither the executive nor the judiciary has any means of forcing the legislature to exercise a mandate of the constitution.[2] The sole remedy for dereliction lies with the electorate and consists in choosing congressional majorities which will observe the constitution's requirements.

Exclusive and concurrent powers

Two other categories of legislative powers remain to be distinguished, namely, exclusive and concurrent or independent powers. The mere fact that Congress has been invested with authority to legislate upon a given subject does not necessarily mean that the states are thereby deprived of the right to legislate upon the same subject. Naturally, in all cases where the power has been expressly prohibited to the states in the constitution, as, for example, the coining of money and the laying of duties on imports,[3] Congress alone may legislate, and in such cases its power is said to be exclusive. Congress likewise has exclusive power in cases in which, from the nature of the power or from the nature of the subject to which the power relates, legislative power must necessarily be exercised by the national government; for example, naturalization and the regulation of foreign and interstate commerce.[4] But in practically all cases which do not fall within these two classes, Congress and the state legislatures are said to possess concurrent or independent power, and there may be acts of Congress and state statutes relating to the same subject, each in full force at the same time. Thus there may be both national and state management or supervision of congressional elections; and both Congress and the states may exercise the right to lay taxes upon the same property or incomes. A state law which is repugnant to the national law upon the same subject will, of course, have to yield to the latter. The phrase "concurrent power" is also used to denote certain powers which may be exercised by a state until Congress legislates on the subject. On bankruptcy, for example, each state is at liberty to pass its own laws, and these measures remain in full force and effect until Congress exercises its right to legislate on that subject. When Congress acts, the state laws are suspended; although the mere repeal of the congressional statute would auto-

[1] Art. III, § 2, cl. 2.
[2] Willoughby, *Constitutional Law of the United States*, I, 573-574.
[3] Art. I, § 10, cls. 1-3.
[4] Willoughby, *op. cit.*, I, 73-77, 543-550.

matically revive them unless they had been repealed in the meantime by the state legislature.[1]

Express restrictions

Not only are the powers of Congress thus limited in a general way by the nature of our federal government, but the framers of the constitution took pains to include in the instrument a number of express restrictions on congressional legislative activity. Most of these restraints are enumerated in the ninth section of the first article. Here one finds that the privilege of the writ of habeas corpus may be suspended only when the public safety requires it in time of rebellion or invasion; that no bill of attainder or ex post facto law may be passed; that no preference may be given through commercial regulations or revenue laws to the ports of one state over those of another; that vessels bound to or from one state shall not be obliged to take out clearance papers or pay duties in another; that money may be drawn from the public treasury only after appropriations thereof have been made by law; and that no titles of nobility may be granted.

Other limitations

Farther limitations are found in other parts of the constitution. Thus Congress may alter the regulations prescribed by law in each state respecting the times, places, and manner of holding elections for senators and representatives "*except* as to the places of choosing senators."[2] Again, although the power of taxation given to the national government is very comprehensive, there are certain express and implied limitations upon its exercise. Thus when direct taxes (except income taxes) are laid, they must be apportioned among the several states on the basis of their respective populations;[3] when indirect taxes, such as duties, imposts and excises, are laid, they must be assessed upon a basis of uniformity, that is, at a uniform rate upon each unit of the thing taxed throughout the United States;[4] no tax whatever may be laid upon articles exported from any state;[5] and, under the implied limitations upon the taxing power growing out of the nature of our federal government, Congress may not tax the essential governmental agencies of a state, including the salaries of state officials, steps in state judicial proceedings, and the property or borrowing power of a state or municipality.[6]

Furthermore, in providing for the support of the army, Congress may not make appropriations from the national treasury for

[1] See pp. 458-459. [2] Art. I, § 4, cl. 1. [3] Art. I, § 9, cl. 4.
[4] Art. I, § 8, cl. 1. [5] Art. I, § 9, cl. 5.
[6] Willoughby, *Constitutional Law of the United States*, I, 110-119.

a longer period than two years.[1] By including in the constitution a definition of the crime of treason, the framers have effectually prevented the legislative branch of the government from extending the list of offenses which may be prosecuted as treason; and in declaring what shall be the punishment for treason Congress is farther restricted by the provision that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."[2] Some of the provisions of the bill of rights embraced in the first ten amendments expressly, and others impliedly, place important limitations on congressional law-making powers. Finally, Congress, like other legislative bodies may pass no irrepealable act; any measure put on the statute-book by one Congress is legally subject to removal therefrom, or to any amount of amendment, by any subsequent Congress.[3]

The two most important powers expressly conferred upon Congress, namely, the power to tax and to borrow money and the power to regulate foreign and interstate commerce, will receive somewhat detailed treatment in the next two chapters.

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[1] Art. I, § 8, cl. 12. [2] Art. III, § 3, cl. 1-2.
[3] Cooley, *Principles of Constitutional Law* (2nd ed.), 100-102.

CHAPTER XXVII

NATIONAL FINANCE

Financial weakness of the Confederation, 1781-1789

As a frame of government, the Articles of Confederation were fundamentally defective in that they gave Congress no dependable means of raising money. Congress was, indeed, authorized to make requisitions on the states, *i.e.*, to ask the state governments from time to time to turn over for national use funds raised by them within their several jurisdictions in such manner as they might adopt. But the national authorities had no way other than the use of armed force of compelling a state to heed the requests thus made of it; and in practice most states largely ignored or evaded them. Congress itself had absolutely no power to tax; it could not reach down past the state governments to the individual citizen, levy a money charge on his property or business or income, and enforce payment by seizing and selling the possessions of delinquents. Yet, as all experience shows, without this power, no government can, in the long run, exist. Two attempts were made, in 1781 and 1783, to amend the Articles so as to give Congress a restricted power to impose duties on imports. On the first occasion, however, Rhode Island, and on the second, New York, held out against the change, thereby (since unanimity was required for the adoption of amendments) preventing it from being made.[1]

The taxing clause of the constitution

It is not to be wondered at, therefore, that the convention of 1787, called for the purpose of revising the Articles and rendering them "adequate to the exigencies of the Union," took it for granted from the first that, whatever else was done or not done, the national government was to be endowed with independent revenue-raising authority. And, very appropriately, the long list of powers given to Congress in the eighth section of the first article of the constitution starts off with the power "to lay and collect taxes, duties, imposts and excises." Under this grant Congress raised by taxation, down to 1910, the sum of twenty billion dollars; under

[1] G. T. Curtis, *Constitutional History of the United States* (rev. ed.), I, Chaps. VIII, X.

CHAP. XXVII

it, nearly six billion dollars were raised in the single fiscal year ending June 30, 1920.

Restrictions on the national taxing power:

Comprehensive, however, as is the taxing power thus granted to the national government, taxes must be laid in accordance with several express or implied restrictions:

1. Purposes of taxation

Congress is not free to lay and collect taxes for any and all purposes whatsoever, but only "to pay the debts and provide for the common defense and general welfare of the United States." This phraseology is, however, broad and loose, and in practice it does not impose a very serious restriction beyond ensuring that taxes shall be levied for public, rather than private, purposes. Congress alone decides what will promote the general welfare, and, accordingly, what is a legitimate purpose of taxation. Furthermore, there is no limitation whatever on the power to incur indebtedness payable by taxation. Hence we find Congress promoting the "general welfare" by imposing taxes in aid of institutions of higher learning, although they are attended by only a comparatively small part of the population, for the assistance of "world's fairs" and similar expositions, for the maintenance of Yellowstone Park and other national parks in remote sections of the country, for the protection of seals whose skins can be worn only by the well-to-do, for the preservation of game on a National Bison Range, for the construction of the Panama Canal and of enormous irrigation works in the western states, and for the erection of monuments to the memory of departed heroes and statesmen.[1]

2. Apportionment of direct taxes

The taxing power is limited by the requirement that direct taxes shall be apportioned among the several states according to their population.[2] Congress first determines the total amount to be raised by direct taxation, and each state's quota is then fixed in proportion to its population and assessed upon the property of the individual citizens. The phrase "direct taxes" is not defined in the constitution, and long controversies arose out of this fact when it was desired to lay a tax on incomes. As defined in various decisions of the Supreme Court prior to 1895, the phrase included only poll or capitation taxes and taxes on real estate.[3] Direct

Direct taxes defined

[1] McLaughlin and Hart, *Cyclopedia of American Government*, II, 8.

[2] Art. I, § 2, cl. 3.

[3] Hylton *v.* United States, 3 Dallas, 171 (1794); Pacific Ins. Co. *v.* Soule, 7 Wall., 433 (1868); Veazie Bank *v.* Fenno, 8 Wall., 533 (1869). See also C. J. Bullock, "The Origin, Purpose, and Effect of the Direct-Tax Clause in the Federal Constitution," *Polit. Sci. Quar.*, XV, 217-239, 452-484 (Sept. and June, 1900).

taxes, in this sense, have been levied on only five occasions, the last being in 1861, when a direct tax of twenty million dollars was laid on lands, houses, and slaves. Economic conditions made this levy an anachronism, for wealth was not distributed according to population, and personal property had increased far more rapidly than real estate. The eastern manufacturing centers were therefore favored at the expense of the agricultural districts.[1]

Income taxes

In 1862 Congress for the first time imposed a tax upon incomes, with certain exemptions. Assuming that an income tax was not a direct tax, it made no effort to apportion the tax among the states according to their population, but rather made it apply uniformly to the various classes affected by it. In a test case which eventually reached the Supreme Court, opponents of the law argued that an income tax was a direct tax, which required apportionment, and that therefore the law in question was unconstitutional.[2] Adhering, however, to the earlier judicial definitions of direct taxes, the court decided that an income tax was not a direct tax, and accordingly upheld the constitutionality of the law. Before the decision was rendered the tax was, in point of fact, repealed by Congress. Some thirty years then passed. But finally, in 1894, Congress, acting under pressure from a small group of Populist members who then held the balance of power, levied another income tax.[3] This law did not differ essentially from that of 1862, and both Congress and the general public assumed that one was just as valid as the other. Nevertheless, it was challenged in the courts upon grounds similar to those urged against the constitutionality of the previous measure; and in 1895 the Supreme Court, reversing precedents of long standing, extended the meaning of "direct taxes" to cover taxes imposed on incomes derived both from land and from personal property, which must, therefore, in order to be constitutional, be apportioned according to population. Since the act in question levied the tax on a basis of uniformity, it was declared unconstitutional.[4]

Sixteenth Amendment

For this decision the Supreme Court was roundly criticized on the stump and in the Democratic and Populist platforms in the

[1] McLaughlin and Hart, *Cyclopedia of American Government*, III, 508.

[2] Springer *v.* United States, 102 U. S., 586 (1870). See C. G. Tiedeman, "The Income Tax Decisions as an Object Lesson in Constitutional Construction," *Annals of Amer. Acad. Polit. and Soc. Sci.*, VI, 268-279 (Sept., 1895).

[3] C. F. Dunbar, "The New Income Tax," *Quar. Jour. Econ.*, IX, 26-46 (Oct., 1894).

[4] Pollock *v.* Farmer's Loan and Trust Co., 158 U. S., 601 (1895).

presidential campaign of 1896. But nothing was done to remedy its effect—indeed, in the nature of the case nothing could be done—until in response to growing popular demands, and with a view to helping meet increasing burdens upon the treasury, Congress, in 1909, approved and referred to the states the Sixteenth Amendment, which, as we have seen, became effective in 1913.[1] Since that date, Congress has been permitted to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states." This in no way alters the legal status of income taxes, which continue to be classed as direct taxes under the decision of the Supreme Court rendered in 1895. It merely relieves Congress from the necessity of apportioning such taxes according to population, a thing which would be quite impossible without inflicting grave injustice upon the people of some states.[2] Promptly upon the ratification of the Sixteenth Amendment, Congress passed the income tax law of 1913 which, with modifications, is still in force.[3] Indeed it may safely be said that the taxation of incomes has become a permanent part of our national fiscal policy.

3. Uniformity of indirect taxes

By far the greatest part of the national revenue has always come from indirect taxes, and in laying these Congress is restricted by the constitutional requirement that "that all duties, imposts, and excises shall be uniform throughout the United States."[4] This does not prevent a tax upon tobacco, for example, from falling more heavily upon some geographical sections than others: it merely means that all tobacco of a certain quality or weight shall be taxed at the same rate in all parts of the country, and that when duties are laid on imports, the rates upon any class of commodities shall be the same at Atlantic, Pacific, or any other ports of entry. This requirement of uniformity does not apply, however, to goods coming into the country from Porto Rico or the Philippines; they may be taxed at rates different from those which apply to imports from foreign lands. Under the decisions of the courts, Congress is free to impose such duties as it sees fit upon commodities coming from the insular dependencies.[5]

[1] See p. 213.

[2] Brushaber *v.* Union Pacific R. R., 240 U. S., 1 (1916).

[3] R. G. Blakey, "The New Income Tax," *Amer. Econ. Rev.*, IV, 25-46 (Mar., 1914).

[4] Art. I, § 8, cl. 1.

[5] De Lima *v.* Bidwell, 182 U. S., 1 (1901); Downes *v.* Bidwell, 182 U. S., 244 (1901); Dooley *v.* United States, 182 U. S., 222 (1901).

4. Taxes on exports and state governmental agencies

Speaking broadly, Congress is free to tax anything, in any amount. Two exceptions, however, are to be noted: (a) the constitution forbids the laying of duties on exports, although Congress is authorized to regulate export trade in every way save by taxation; and (b) from the nature of the federal union, as previously explained, there arises an implied limitation which prevents Congress from taxing the property or the essential governmental functions of the several state governments and of municipalities created by them, including the salaries of state and local officials.[1]

Scope of the national taxing power

Except as restricted in the foregoing ways, Congress is free to select any or all objects or persons to be subject to taxation, and is absolutely untrammelled by constitutional limitations in determining the amount which shall be raised by various kinds of taxes. The Supreme Court has repeatedly held that if it can be shown that Congress has the authority to tax any class of persons or articles at all, the determination of the amount, as well as the expediency, of the tax rests with Congress alone; and that the remedy for excessive or inequitable taxation lies, not with the courts, but with the electorate. Furthermore, the courts will not inquire into the motives which may have actuated Congress in determining the kind and amount of taxation. In most cases, of course, the primary motive is fiscal, that is, to raise revenue. But there are many instances in which Congress has exercised its power to tax, not primarily from fiscal considerations (for the tax has been so high as to be unproductive), but mainly with a view to the stricter regulation of certain kinds of business, and in some cases with the avowed purpose of destroying a business. Thus, in order to give the national banks a monopoly of the business of issuing bank notes, a tax of ten per cent was laid on the notes issued by state banks; in other words, state bank notes were taxed out of existence. The same purpose to destroy underlay the act of 1912 placing a burdensome tax on the manufacture of poisonous phosphorous matches, and the act of 1916 (subsequently held unconstitutional by the Supreme Court) [2] imposing a heavy tax on all articles of interstate commerce which were manufactured with the aid of child labor.

Motives influencing taxation

Similarly, in tariff legislation, duties upon certain articles may be put so high as to preclude the possibility of any considerable

[1] See p. 403.

[2] Hammer *v.* Dagenhart, 247 U. S., 251 (1918).

CHAP. XXVII

revenue, the main purpose of the tax being to protect home industries from foreign competition; although, in connection with most of the articles listed in tariff schedules, some effort is made to adjust the amount of duties in such a way as to make the tax productive from the fiscal point of view and at the same time protective from the point of view of the home producer. Again, in the corporation, income, and inheritance taxes of the past few years it is easy to discern, along with the fiscal motive, the purpose to reduce the size of "swollen fortunes" and to bring about a readjustment of the national tax burden such that a larger share of it will be borne by the well-to-do classes than was true when the major part of our national revenue came from import duties and excise taxes on liquors and tobacco.

Yield of direct and indirect taxes

Of the total revenue collected by the national government between 1789 and 1910, only a relatively small portion, namely, about twenty-eight million dollars, came from direct taxes; and after the Civil War that form of taxation was left entirely to the states, at all events until the enactment of the federal income tax law of 1913.[1] During the same period customs duties on imports yielded more than eleven billion dollars, and excise taxes, chiefly, on liquors and tobacco, produced eight and one-half billions—a total from indirect taxation of about ninety-six per cent of the entire national income.[2] The first taxes laid by the new government under the constitution were duties on imports, and down to the Civil War such duties formed the most important single source of revenue. The falling off in their yield at the beginning of that conflict, however, together with the extraordinary demands made upon the national treasury throughout the struggle, compelled Congress in 1862 to resort to excise or internal revenue taxes, which, until then had been employed only intermittently[3] and on a modest scale.[4] Not only were liquors and tobacco heavily taxed, but license fees were required of persons engaged in certain occupations, and taxes were for the first time imposed on incomes. Furthermore, not only were finished products taxed, but also the various stages and materials of manufacture, for example, bolts, castings, trimmings, etc., used in steam engines, and the paper,

Customs duties

Internal revenue

[1] See p. 408.

[2] McLaughlin and Hart, *Cyclopedia of American Government*, II, 6.

[3] In 1791-1802 and 1813-1818.

[4] It must be observed, of course, that the government has never been entirely dependent on the proceeds of taxation. The income from the sale of public lands, for example, was for many years large.

cloth, leather, boards, thread, glue, gold-leaf, and type-material which went into the manufacture of a book. Stamp taxes, too, were imposed on commercial paper, insurance policies, deeds, mortgages, and other documents.[1] Indeed, any student of our national tax policy in the Civil War era will have no difficulty in seeing where Congress found precedents for many of the extraordinary excise taxes laid during the Spanish-American War in 1898,[2] and especially during our participation in the World War in 1917-18.

At no time after the Civil War was it deemed feasible to dispense with excise taxes; on the contrary, they established themselves as a permanent part of our fiscal system and continued to yield varying proportions of the total national revenue. By successive acts in and after 1866 Congress, indeed, remitted the taxes on many articles and processes, and eventually the only things taxed were certain luxuries, chiefly liquors and tobacco. Mounting revenues and treasury surpluses after 1880 led extreme protectionists to urge that even these taxes be abolished. But the only action taken was to reduce the rates, and the Spanish-American War ended all talk of dispensing with the excise system completely. Within a decade, indeed, Congress, far from abolishing the system, extended it to new fields, with a view to obtaining increased revenue with which to meet the again rapidly mounting expenses of the government, and also as a "weapon to compel economic readjustments."

New taxes

In 1909 a tax was imposed on the net income or profits of corporations doing an interstate business;[3] and after the ratification of the Sixteenth Amendment in 1913 a tax was laid on all private incomes above stated amounts. The outbreak of the war in Europe in 1914 reduced receipts from customs and at the same time made new and heavy expenditures imperative. Accordingly, excise duties were increased; license taxes were imposed on business and amusement establishments; stamp taxes were laid on insurance policies, telegraph messages, etc.; and in 1916 the fourth progressive inheritance tax in our history was adopted.[4] Our actual par-

[1] McLaughlin and Hart, *Cyclopedia of American Government*, III, 212. See also H. E. Smith, *The United States Federal Internal Tax History from 1861 to 1871* (Boston, 1914).

[2] C. C. Plehn, *Finances of the United States in the Spanish War* (Berkeley, 1898).

[3] C. A. Conant, "The New Corporation Tax," *No. Amer. Rev.*, CXC, 231-240 (Aug., 1909).

[4] Inheritance tax laws were passed in 1797 (repealed in 1802), 1862 (repealed in 1870), and 1898 (repealed in 1902). "These were strictly legacy

ticipation in the war in 1917-18 naturally entailed a quite unprecedented increase in the range and amount of taxation.[1] All existing tax rates were raised, and an immense number of persons, occupations, products, and manufactures that had been exempt were now obliged to contribute to the support of the government in its great enterprise. Of these newer taxes, the most important were a heavy and progressive tax upon excess profits, suggested by the recent experiences of our associates in the European struggle, and greatly increased rates on incomes and inheritances. Since the end of the war it has been found possible to remit a few taxes and to lower certain rates. The enormously increased national debt, together with continued expansion of governmental activity in various directions, will, however, make it necessary to maintain taxation at somewhere near its present level for many years.

Yield of national taxes in 1920

The following table[2] indicates the principal subjects of national taxation, together with the revenue accruing from each, for the fiscal year ending June 30, 1920:

Income and excess profits	$3,956,936,003.60
Distilled spirits and beverages	197,332,105.84
Tobacco	295,809,355.44
Transportation, communication, and insurance	307,769,841.36
Luxuries (automobiles, candy, furs, etc.)	270,971,064.27
Estate inheritances	103,635,563.24
Capital stock of corporations, brokers, etc.	95,141,732.50
Stamps on legal documents	81,259,365.47
Admissions to amusements	89,710,525.59
Miscellaneous	9,014,694.50
Total internal revenue	$5,407,580,251.81
Customs duties	296,274,230.35
Tax on national bank circulation	7,172,598.48
Postal war revenue	4,913,000.00
Total amount raised by taxation	$5,715,940,080.64

Double taxation

Inasmuch as both Congress and the states may tax the same persons or property at the same time, there has always been a possibility of double taxation. Except in war-times, however,

taxes, however, on personal estates, with the exception of the 'succession tax' on real property levied in 1864 and repealed in 1870." *Amer. Year Book* (1916), 351. See M. H. Hunter, "The Inheritance Tax," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 165-180 (May, 1921).

[1] E. R. A. Seligman, "The War Revenue Act," *Pol. Sci. Quar.*, XXXIII, 1-37 (Mar., 1918); F. W. Taussig, "The War Tax Act of 1917," *Quar. Jour. Econ.*, XXXII, 1-37 (Nov., 1917); R. G. Blakey, "The War Revenue Act of 1917," *Amer. Econ. Rev.*, VII, 791-815 (Dec., 1917); R. M. Haig, "The Revenue Act of 1918," *Pol. Sci. Quar.*, XXXIV, 369-391 (Sept., 1919).

[2] E. B. Rosa, "Expenditures and Revenues of the Federal Government," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 50-51 (May, 1921).

Congress has, for the greater part, confined national taxation to import duties[1] and a few excise taxes, thus leaving to the states almost a monopoly of the taxation of real estate, personal property, corporations, incomes, and inheritances. With the enactment of the national corporation tax in 1909, the income tax in 1913, and the progressive inheritance tax in 1916, however, and the marked extension of the list of kinds of personal property subject to excise taxes, the amount of double taxation has been greatly increased. As a result, problems of the utmost importance and of great intricacy have arisen, and the determination of the proper spheres of the national and state governments, respectively, in the taxation of coming years promises to be no easy task.[2]

Collection of revenue

Most of the national revenue is collected under the general supervision of the Secretary of the Treasury, by one or the other of two branches of that department, namely, the customs and internal revenue services. For the collection of customs duties the country has been divided into forty-nine collection districts, each containing a main port of entry in charge of a collector or deputy collector of customs, who is regularly a political appointee. Duties may be paid at any one of a total of more than three hundred main and subsidiary "ports of entry," all located on the Pacific and Atlantic coasts, on or near the Canadian and Mexican borders, or in Alaska, Hawaii, and Porto Rico; a port of entry being officially defined as a place "at which a customs officer is stationed with authority to enter and clear vessels and collect duties on imports."[3]

1. Customs duties

2. Internal revenue

The internal revenue service is in charge of a commissioner of internal revenue, under whom is a staff of several thousand officials engaged in the collection of the various internal revenue taxes. The country is divided for this purpose into sixty-six districts, each with a collector of internal revenue and a large number of deputy collectors. The latter have at times been selected in accordance with merit rules, and at other times have been political appointees; the collectors themselves have never been put on the merit basis. The work of these collectors and their assistants includes not only the gathering of the regular excise taxes, *e.g.*, on tobacco, but the collection of the corporation and income taxes

[1] Congress has practically exclusive power to tax imports and lay tonnage duties, in view of the restrictions on the states in these matters. See Art. I, § 10, cl. 2.

[2] Cf. Chap. XL.

[3] See *Customs Regulations of the United States*, issued at frequent intervals by the Treasury Department.

as well. Formerly the collection of the national revenues was to a large extent automatic. That is to say, foreign goods could not be imported, and domestic goods subject to taxation could not be manufactured or sold, until the importer, manufacturer, or dealer had paid whatever taxes were due. In the case of importations, cash payments prevailed; in the case of excises, the method was mainly that of the sale of stamps or licenses. Beginning with the corporation tax law of 1909, however, other and more complicated methods have been introduced, although the customs and ordinary internal taxes continue to be gathered as before. The collection of the private and corporate income taxes, and of the inheritance and excess profits taxes is based upon sworn statements of the taxpaying individual or corporation. Such statements may be evaded or falsified, and consequently much time and energy must be given by the revenue authorities to investigative work. Any statement may be challenged and minutely inquired into if the revenue officers have reason to doubt its accuracy or completeness.

3. Miscellaneous revenues

Of course not all of the national income is collected by the customs and internal revenue services. Large amounts accrue every year in the form of postal revenues, income from the mint, fees for patents, copyrights, steamboat and other licenses not classed as excise taxes, proceeds of the sale of government property, especially public lands and war supplies, and the yield of fees and fines in the courts. All of these moneys are collected directly by the various agencies concerned, and, like the proceeds of the customs and internal revenue, are turned into the general treasury.

Treasury system

The treasury of the United States is located at Washington, where there are vaults specially constructed for the keeping of the money and securities of the government. Formerly, large portions of the revenue collected were deposited in one or another of nine sub-treasuries, situated in principal cities throughout the country, and money was paid out from these sub-treasuries on proper warrant.[1] The Secretary of the Treasury is, however, authorized to designate various national banks as depositories and to place national funds in their keeping, provided they make a deposit with him of government bonds or other satisfactory securities; and upon the expansion of the national banking system by

[1] M. L. Muhleman, *The Treasury System of the United States* (New York, 1907).

the creation of the federal reserve banks in 1913 [1] this practice was so broadened as to lead in 1921 to the abandonment of the sub-treasuries altogether. The government's money is now kept principally, therefore, in the federal reserve banks, together with a reduced number of ordinary national banks, and is paid out from them on warrant properly issued and attested.[2]

Origin and enactment of revenue laws

All laws for raising revenue must originate in the House of Representatives. It was plainly the intention of the framers of the constitution that the House, whose members alone were chosen directly by the electorate, should control the national purse, very much as does the House of Commons in England. The matter, however, has not worked out altogether in this way. All the great revenue bills, as indeed also the annual appropriation bills, are first introduced in the House. But the Senate has unlimited power of amendment, and in practice most revenue bills are extensively and permanently reconstructed at the hands of that body. There is nothing to prevent the upper house from adding an amendment to a House revenue bill striking out all parts after the enacting clause and inserting an entirely new bill; and something of the sort has happened on several occasions, notably in 1872, when a House bill of only a few lines and affecting the duties on only two commodities was amended in the Senate into a measure covering twenty printed pages and comprising an extended revision of the tariff, and again in 1888-89, when a House bill to reduce taxation and reorganize revenue collection was transformed by the upper house into a general revision of both customs duties and internal taxes.[3]

Tariff legislation

Under normal conditions, the most important revenue measures are the laws commonly known as tariff acts, which prescribe the duties to be imposed upon articles imported from other countries. In the tariff acts of 1909 and 1913 the various articles subject to duty were grouped together in fourteen different "schedules," lettered from "A" to "N" inclusive; and following these schedules came a list of articles placed upon the "free list." These acts also

[1] See p. 428.

[2] On the history of the independent treasury system, see D. Kinley, *History, Organization, and Influence of the Independent Treasury of the United States* (New York, 1893), and "The Independent Treasury of the United States and Its Relations to the Banks of the Country," 61st Cong., 2nd Sess., Sen. Doc. No. 587 (1910).

[3] A. M. Low, "The Usurped Power of the Senate," *Amer. Polit. Sci. Rev.*, I, 1-16 (Nov., 1906). Cf. Reinsch, *American Legislatures and Legislative Methods*, 108-112.

included elaborate provisions for their administration or enforcement. Sometimes, too, a tariff act includes sections imposing internal taxes, or excises, of one kind or another. For example, the act of 1909 provided for a tax on the net income of corporations, and that of 1913 included the income tax law of that year. As a rule, however, internal revenue taxes have been imposed in laws which are separate from any tariff act, *e.g.*, the emergency revenue act of 1914 and the revenue act of 1917.

Framing tariff bills

The framing of a tariff bill, or of any other revenue measure, is the peculiar function of the committee on ways and means of the House of Representatives. Because of the political importance of all such measures, especially tariff bills, this committee and the

1. In committee

corresponding Senate committee on finance have come to be second in importance to no other congressional committees; and the chairman of the committee on ways and means is the floor leader of the majority party in the House. This committee consists of twenty-five members (1921), seventeen belonging to the majority party and the rest to the minority party.[1] In the framing of tariff bills the minority members of the committee have little or no influence. The majority members are divided into a number of sub-committees, each of which is charged with the preparation of some portion of the bill, and their work is whipped into final shape by the rest of the majority. During the preparation of the bill, public hearings may be held for the purpose of gathering information; and lobbyists, representing the varied special interests which are likely to be benefited or adversely affected by tariff changes, are actively engaged in attempts to influence the action of majority members of the committee.[2] There have been instances in which certain schedules were actually prepared outside of the committee by the representatives of industries peculiarly interested

[1] Before the Civil War some of the secretaries of the treasury took such a leading part, along with the committees on ways and means, in the framing of tariff measures as to give their names to certain of the resulting acts. Thus we have the Dallas act of 1816 and the Walker tariff of 1846. In later decades, however, most tariff measures have been called by the name of the chairmen of the committees responsible for them, as the McKinley bill of 1890, the Wilson-Gorman act of 1894, the Dingley act of 1897, the Payne-Aldrich act of 1909, and the Underwood tariff of 1913.

[2] S. M. Evans, "Making a Tariff Law," *Jour. Pol. Econ.*, XVIII, 793-815 (Dec., 1910). On recent tariff lobbying, see J. C. O'Laughlin, "The Invisible Government under the Searchlight," *Rev. of Revs.*, XLVIII, 334-338 (Sept., 1913); C. S. Thomas, "My Adventures with the Sugar Lobby," *World's Work*, XXVI, 540-549 (Sept., 1913).

in them—notably schedules dealing with steel and wool—and were accepted by the committee practically unchanged.

2. In the houses

After the majority members of the committee have come to an agreement upon the final form of the bill, the minority members are called in, so that a formal vote of the entire committee may be had upon the measure. Thereupon the bill is reported to the House,[1] where it is almost certain to become the most important subject of debate during the session. The minority is usually given time in which to express dissent and criticism, but is seldom in a position to force any important changes if the bill, as almost invariably happens, is made a party measure. Having passed the House, the measure goes to the Senate, which may pass it with only slight changes or may alter it almost beyond recognition.[2] If important changes are introduced, the bill goes back to the House and is immediately referred to a conference committee representing both houses, which endeavors to effect a compromise. Whatever is agreed to by this conference committee, working in secret, is almost certain to pass both houses. In other words, opportunity is here offered for the insertion of important and far-reaching changes, not contemplated in the original or amended bill, at a time when it is too late for them to be considered by either house.

Absence of responsibility

From these facts it is apparent that the fixing of responsibility for national tax legislation is no easy matter. Certainly praise or blame cannot be concentrated on any single officer like the Chancellor of the Exchequer in England; rather, responsibility is divided, scattered, diffused. Each house shares it. But who among the five-hundred-odd members can be held to a strict accountability, especially when the final decision of the powerful committees in charge of such measures are arrived at in secret? The general public, which is seldom adequately represented before these committees has, in the past decade or two, come to look more and more to the president to interpose in its behalf his great influence as chief executive and as leader of his party.

[1] In 1913 the Underwood bill was first debated in the Democratic caucus before being reported to the House.

[2] Usually the Senate, through its finance committee, will have been working on a bill of its own, and large portions of this measure may be injected into the House bill. In 1909 the Senate adopted a bill of its own, as a substitute for the Payne bill which came up from the House, and the resulting Payne-Aldrich act was a fusion of the two measures, worked out in conference committee. Of the 674 Senate amendments to the Underwood tariff bill of 1913, 426 were accepted without change by the House.

CHAP. XXVII

The Tariff Commission

Tariff schedules have become exceedingly intricate—indeed, a veritable labyrinth, or jungle—so that even the most conscientious congressman knows the merits of hardly more than a small fraction of the provisions on which he is expected to vote. This fact has convinced many people, including members of Congress and two recent presidents, that the old type of tariff legislation, carried on largely in a partisan spirit and in ignorance of the conditions involved, by small groups of members of Congress acting under the spur of special interests, ought to give place to legislation based upon scientifically ascertained and up-to-date information, which shall always be available for framers of tariff bills and for members of Congress generally. With this end in view, they have advocated the establishment of a permanent and impartial tariff board or commission. Such a board was provided for in the Payne-Aldrich act of 1909; but in 1913 a Democratic Congress cut off all appropriation for its support, and it came to an end. As late as 1915 President Wilson declared that the United States had all the machinery that was needed for investigation of tariff problems. Early in 1916, however, he changed his views and vigorously advocated a tariff board to secure facts on which Congress might act in making tariff changes. As a result, the general revenue act of September 7, 1916, created a Tariff Commission—wholly outside of any executive department—consisting of six members, representing the two leading parties, appointed by the president and Senate for twelve-year terms. Its principal duties are to investigate (1) the administrative, fiscal, and industrial effects of tariff laws; (2) the relation between rates on raw material and finished product; (3) the effects of ad valorem and specific duties; (4) the effects of the tariff on labor; (5) tariff relations with other countries; and (6) the best arrangement of schedules and classifications. The Commission has no power to make any changes in tariff laws or in their administration. Nevertheless, its work may prove of the highest value in adjusting future tariffs to the actual needs of the country, and in reducing the amount of pernicious lobbying and log-rolling which have long impeded the processes of tariff legislation.[1]

[1] F. W. Taussig, "The Proposal for a Tariff Commission," *No. Amer. Rev.*, CCIII, 194-204 (Feb., 1916); J. B. Reynolds, "The Tariff Commission Plan: Its Facts and Fallacies," *ibid.*, CCIII, 852-866 (June, 1916); E. P. Costigan, "The United States Tariff Commission," *The Searchlight*, IV, 16-20 (Sept., 1919), a summary of the work of the Commission.

Objects of expenditure

Some idea of the purposes for which our enormous national income has been expended in recent years may be obtained from the following statement of net[1] expenditures for the fiscal year ending June 30, 1920, classified according to various functional activities of the government:

(1) Maintenance of the executive, legislative, and judicial branches of the government, including the diplomatic and consular services abroad, the Interstate Commerce Commission, the Federal Trade Commission, and penal institutions	$224,110,594.00
(2) Scientific research, education, and developmental work, including the Library of Congress, the Smithsonian Institution, the public health service, and public parks	57,368,774.00
(3) Public works, including river and harbor improvements, public buildings, the reclamation service, and the Alaskan railroad	83,071,042.00
(4) The army and navy, maintenance and development, and fortifications	1,348,892,747.00
(5) Pensions and the care of soldiers, including war risk insurance	329,261,746.00
(6) Obligations arising out of the World War, including the deficit of the Railroad Administration, the Shipping Board, federal control of telegraphs and telephones, and the food, fuel, and war labor administrations	1,634,695,094.00
(7) Interest on the national debt	929,131,128.00
(8) Public Debt, loans, and trust funds	1,079,181,723.00
Total	$5,687,712,848.00

Stated more concisely, three per cent of the appropriations for the fiscal year 1920 went for general governmental purposes (legislative, executive, and judicial); three per cent was expended on public works; one per cent was devoted to research, education, and development; and ninety-three per cent went for the army, the navy, railroad deficit, shipping board, pensions, war risk insurance, and interest on the public debt, practically all of which were obligations arising either from an actual war or from preparations for possible future wars.[2]

[1] Net expenditures are the difference between the gross appropriations and the fees or earnings of the various departments. Although it is common to speak of a "billion-dollar Congress," the government did not cost the taxpayers a billion in any year before the World War. "In no single year prior to our entry into the Great War were the *net* expenses of the government payable from taxation as much as 700 million dollars." E. B. Rosa, *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 5-6, 7-9, 54-60 (May, 1921).

[2] E. B. Rosa, "Expenditures and Revenues of the Federal Government," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XC., 4 (Mar., 1921). Cf. H. D. Brown, "The Historical Development of National Expenditures," *Acad. Polit. Sci. Proceedings*, IX, 6-16 (1921); R. C. Leffingwell, "Retrenchment in National Expenditure," *ibid.*, 156-172.

CHAP. XXVII

Average net expenditures

The following table summarizes the average annual net expenditures of the national government for seven pre-war years, three war years, and 1920:[1]

	Average, 1910-1916	Average, 1917-1919	1920
Primary governmental functions	$97,718,290	$124,509,073	$224,110,594
Research, educational, developmental	25,329,328	33,692,610	57,368,774
Public works	85,408,910	59,857,380	85,071,042
Army and navy	256,971,389	6,302,322,105	1,348,892,747
Pensions and care of soldiers	165,439,944	236,816,982	329,261,746
Obligations arising from recent war	.....	1,205,255,174	1,634,695,094
Interest	23,605,213	115,853,240	929,131,128
Public debt, loan, and trust funds	4,982,411	3,210,794,518	513,885,254
Total net expenditures...	$659,455,445	$11,289,201,082	$5,123,416,421
Total revenue	645,502,171	2,997,238,016	5,687,712,848

Congress and appropriations

Not a dollar of the nation's huge annual income can be legally expended except by direct authority of Congress; and the passing of the great appropriation bills forms one of the most important tasks of that body in every session—almost, as a rule, the sole task in the short sessions. Some of these measures contain thousands of items and fill upwards of a hundred printed pages in the "Statutes-at-large." For appropriations are made in great detail. In England, Parliament is content to vote lump sums and leave the administrative authorities to distribute the funds, including the fixing of salaries and wage-scales, largely at their discretion. In our own country, however, one of the chief means by which Congress exercises its exceptionally close control over administration is the detailed and specific allocation of money, cutting off an activity here by leaving it without financial support, adding an activity or agency there by making the necessary fiscal provision, and in these and other ways predetermining far more than do most foreign parliaments the lines on which the government's work shall be carried on.[2]

The framing of appropriation bills

For a long time, appropriation bills were framed and reported on the basis of estimates submitted by the Secretary of the Treasury, by the same committee in the House of Representatives that prepared revenue measures, *i.e.*, the ways and means committee, which

[1] Rosa, *op. cit.*, 54-60.

[2] In France, however, detailed appropriations are made, very much as in the United States.

was raised from a select to a standing committee in 1802; and until 1823 a single annual appropriation bill met all needs. Gradually, however, appropriations came to be separately provided for in a number of distinct bills, and in 1865 a separate committee on appropriations was created. At first the new committee handled all appropriation bills, as had the ways and means committee before it. But soon it was urged that the various committees having jurisdiction of government activities for which appropriations were made should control the appropriation bills relating to the respective activities; and after 1880 no fewer than eight committees, in addition to the committee on appropriations, received this right. Thus the post-office bill (the greatest of the appropriation bills) came to be prepared by the committee on post-offices and post-roads; the army bill and the navy bill were in charge, respectively, of the committees on military affairs and naval affairs; the agricultural bill was the work of the committee on agriculture. The committee on appropriations retained jurisdiction, normally, over only the appropriations for executive, legislative, and judicial expenses, for sundry civil expenses, for fortifications and coast defenses, for the District of Columbia, for pensions, and for all deficiencies.

Unsatisfactory character of the former system

This distribution of labor was defended on the plausible ground that the great specialized committees had a better knowledge of what was needed in their respective fields than the general appropriations committee could be expected to acquire. But, unfortunately, the distribution of labor meant a division of responsibility which in a very short time justified the worst apprehensions of persons who had opposed the new arrangements. Under acts of 1789 and 1800, the Secretary of the Treasury presented annual estimates of expenditures. But these estimates were merely gathered up from the several departments and detached agencies and transmitted without revision. "The head of each department prepared his estimates, or the estimates for his department, without any reference whatever to the estimates submitted by the heads of other departments, and without any reference whatever to the estimated revenues for the fiscal year."[1] Similarly, after the splitting up of committee jurisdiction took place, each of the nine House committees which had power to report appropriation measures—not to mention five others which could report bills inci-

[1] Congressman Tawney, quoted in H. J. Ford, *The Cost of Our National Government*, 13.

CHAP. XXVII

dentally involving charges on the treasury[1]—"acting independently, without restraint, and without regard either to its fair proportion or to the amount of available revenue, reported whatever it deemed desirable, apparently indifferent to an abnormal increase in appropriations or to the creation of a treasury deficit.[2] Quite unlike the English Parliament, which receives all proposals for appropriations from a single source, *i.e.*, the Treasury, and will not consider any such proposal which does not come with the cabinet's approval, Congress received, and usually adopted with little modification (except increases) proposals emanating originally from two or three score of separate, and often rival departments, commissions, and other agencies, and reported by more than a dozen different committees. Under these circumstances, "log-rolling" became a fine art, the "pork-barrel" an inexhaustible resource.[3]

Movement for a budget system

The upshot was a startling growth of public expenditures, whose effect was aggravated by frequent evidences of sheer extravagance and waste; and presently demand arose for reform. Many influences worked for change. The example of the English, French, Canadian, and other budget systems made strong appeal. Rapid progress of budgetary reform in the states had its effect.[4] Careful studies by such agencies as President Taft's Economy and Efficiency Commission and the privately endowed Institute for Government Research at Washington, leading to scientifically framed reports and the publication of scholarly books and a wealth of popular literature, gave the movement impetus. But the final push was supplied by the World War, whose costs, even to the United States, were such as to demand the adoption of every known expedient by which to lessen expenditures and make tax reductions possible. A national budget system had been talked about for twenty years; the war made it a practical necessity; and in 1921 it became a reality.

Budget and Accounting Act, 1921

The first budget bill passed by Congress, in the session of 1919-20, was vetoed by President Wilson on the ground that one of its clauses unconstitutionally limited the president's power of appointment by seeking to prevent it from including the power of removal. But another measure became law soon after the opening

[1] In the Senate, appropriations in recent years have been handled by some fifteen committees.

[2] Alexander, *History and Procedure of the House of Representatives*, 250.

[3] Haines and Haines, *Principles and Problems of Government*, 409-415.

[4] See p. 665.

of President Harding's administration. This Budget and Accounting Act was, as its title indicates, a dual measure: it provided for an audit of government accounts independent of the departments, in a bureau of accounts, under the direction of a comptroller general appointed by the president and Senate for a term of fifteen years; and it set up a budget bureau in the Treasury Department, under a director appointed by the president alone without fixed term, and required the president to transmit to Congress on the first day of each regular session a budget setting forth "in summary and in detail," among other things, (a) estimates of the expenditures and appropriations necessary for the support of the government in the ensuing fiscal year, (b) estimates of government receipts during the ensuing fiscal year, under both the laws existing at the time when the budget is transmitted and the revenue proposals, if any, contained in the budget, (c) the actual expenditures and receipts of the government during the last completed fiscal year, (d) estimates of the expenditures and receipts of the government during the fiscal year in progress, and (e) all essential facts regarding the bonded and other indebtedness of the government. It is farther made the duty of the president to make recommendations to Congress for new taxes, loans, or other means of meeting contemplated deficiencies, to "make such recommendations as in his opinion the public interests require" if a surplus is anticipated, and to present to Congress from time to time supplementary or deficiency estimates for such appropriations as are entailed by laws passed after the transmission of the budget or as are made necessary by any other unforeseen circumstance. For all data and estimates the president, of course, looks to the budget bureau, which, in turn, relies upon the several departments and establishments for information and for regular and deficiency estimates relating to their respective fields of jurisdiction.

Committee changes in House of Representatives

Thus, all estimates now come to Congress as parts of a carefully coördinated fiscal plan, and it remains only to ensure that the executive's recommendations, rather than the former type of independently initiated bills, will be the real basis of action on appropriations in the two houses. This end is substantially attained by a reorganization, in the House, of the handling of appropriation bills by committees. In anticipation of the adoption of a budget law, the House, in 1920, enlarged the committee on appropriations from twenty-one members to thirty-five (*i.e.*, twenty-three majority and twelve minority representatives) and gave it jurisdiction over all

appropriation measures, with the farther provision that the preparation of specific measures might be assigned to fifteen sub-committees. That part of the budget for any given year which relates to appropriations is now, therefore, referred *in toto* to the appropriations committee; all appropriation bills arising out of it, while prepared by sub-committees, are reported by the general committee; and no other committees may introduce any measures of the kind. The Senate is likely to create a similar consolidated committee or super-committee.

The new system has been in operation for too brief a period to permit a general appraisal of its workings. Much remains to be done before it will attain the stable, ripened aspect of English budgetary organization. Under the energetic administration of the first director of the budget bureau,[1] however, large economies have been effected; and the first budget, submitted to Congress by President Harding in December, 1921, commended itself to students of public finance as vastly superior to the *mélange* of independent appropriation proposals formerly poured in upon Congress by the various committees.[2]

Borrowing money

In ordinary times and for ordinary undertakings the income derived from taxation and from fees, services, and other miscellaneous sources suffices to meet the government's needs; at all events, deficits of one year are apt to be offset by surpluses of another. In times of war, however, or other unusual strain, such as a period of business depression, or to meet the cost of some great public work, like the Panama Canal, the government is obliged to resort to borrowing; and the accumulated obligations thus incurred give rise to the national debt. The power to borrow money is expressly granted to Congress in the constitution, being indeed

[1] General Charles G. Dawes.

[2] The mounting expenditures of the United States are scientifically discussed in H. J. Ford, *The Cost of Our National Government* (New York, 1910), and the question of national budgetary reform is fully covered in W. F. Willoughby, *The Problem of a National Budget* (New York, 1918). An illuminating survey is *The Need for a National Budget*, being a report of the President's Commission on Economy and Efficiency, 62nd Cong., 2nd Sess., H. Doc. No. 851 (1912). Other helpful references include Haines and Haines, *Principles and Problems of Government*, 403-459; T. E. Burton, "The Scandal of the Federal Appropriation Bills," *World's Work*, XXV, 438-443 (Feb., 1913); H. L. Stimson, "A National Budget System," *World's Work*, XXXVIII, 371-375, 528-536 (Aug.-Sept., 1919); S. M. Lindsay, "Our New Budget System," *Rev. of Revs.*, LXV, 64-68 (Jan., 1922); R. A. Lewis, "How the Government Budget Works," *World's Work*, XLIII, 513-519 (Mar., 1922); and especially a series of papers on the general subject of national expenditures and public economy in *Acad. Polit. Sci. Proceedings*, IX, No. 3 (July, 1921).

one of the very few powers conferred absolutely without restriction.[1] The United States operates under no debt limit, such as is fixed for many of the states in their constitutions, and such as states commonly establish for counties, cities, and towns. Congress may borrow for any purposes whatsoever, in any amount, and on any terms, and it may provide or fail to provide for the repayment of the loan, with or without interest. The method of borrowing is usually a sale of interest-bearing bonds or treasury certificates to banks, corporations, and private citizens. Never since Revolutionary times has the government been under the absolute necessity of looking abroad for money; although on a few occasions, notably in the Civil War, it has done so, and, of course, its securities were to be found, prior to the World War, in the hands of foreign, as well as domestic, investors. On the eve of our entrance into this war, in 1917, the national debt amounted to about a billion dollars; in 1917-18 alone, some twenty billions were borrowed, chiefly by means of the familiar "Liberty" issues; and in 1919 the total indebtedness exceeded twenty-five and a quarter billions.

National banks: the banks of 1791-1811 and 1816-1836

Mainly to facilitate the sale of government bonds on favorable terms during the Civil War, our present system of national banks was created by act of Congress in 1863. Before that, the government had established two great banking institutions, each operating under a charter granted by an act of Congress, in 1791 and 1816 respectively, for a period of twenty years. Each of these banks assisted the government in collecting national revenues, served as a depository of public funds, loaned money to the government from time to time, and was empowered to issue bank notes which served as paper money. The history of the first of these banks was comparatively uneventful. The career of the second one was, however, marked by grave mismanagement in earlier years, and only after reorganization and under new management did the institution enter upon a period of confidence and success.[2] Even at that, long before its charter expired, it incurred the hostility of rival state banks, which successfully played upon the widespread prejudice then existing against corporations of all kinds, and the question of renewing the bank's charter became the leading issue in the presidential campaign of 1832. Henry Clay,

[1] Art. I, § 8, cl. 2.

[2] Its history is fully set forth in R. C. H. Catterall, *The Second Bank of the United States* (Chicago, 1903). See also R. C. McGrane [ed.], *The Correspondence of Nicholas Biddle* (Boston, 1919).

who championed the bank, was overwhelmingly defeated by President Jackson, the avowed enemy of the institution, who had previously vetoed a bill renewing the charter. Thereupon the bank proceeded to wind up its affairs, and in 1836 it ceased to do business as a national institution.

Question of the power to create banks

Nowhere in the constitution can express authority be found for the creation of these two banks, nor, for that matter, for the establishment of the present national and federal reserve banks. Consequently, when the act of 1791 was before Congress and before President Washington for his approval or veto, strong objections were raised on the ground that the measure was unconstitutional. From the fact that the convention which framed the constitution had definitely rejected a proposal to authorize Congress to charter banks, Madison and Jefferson argued that such authority had been intentionally withheld. Adopting a strict construction of the "implied powers" clause, they vigorously maintained that the power in question was not "necessary and proper" for carrying into execution any express power conferred by the constitution. Hamilton, then secretary of the treasury, argued, on the other hand, that the creation of a bank was a means appropriate, not prohibited, and "necessary and proper" for carrying into execution the express powers to lay and collect taxes, and to borrow money, and that therefore it was authorized under the "implied powers" clause of the constitution.[1] Washington accepted this reasoning and signed the bill. Somewhat curiously, this important question of constitutional law did not come before the Supreme Court until after the second bank was chartered. In the case of McCulloch *v.* Maryland,[2] however, it was squarely presented by the attorneys for the state of Maryland, who, in attacking the constitutionality of the act of 1816, drew largely upon the earlier arguments of Jefferson and Madison. The attorneys for the bank, on the other hand, adhered closely to Hamilton's reasoning in 1791, and, as we have seen, their arguments prevailed with the court.[3]

National banking laws of 1863-64

The decision in this celebrated case established permanently, and put practically beyond question, the right of Congress to create banking corporations. From the time, however, when the second Bank of the United States closed its doors in 1836 until the Civil War, Congress did not avail itself of its right to establish a national banking system. Such banking institutions as existed in this period of upwards of thirty years were created under widely varying

[1] Art. I, § 8, cl. 18. [2] 4 Wheaton, 316 (1819). [3] See p. 154.

state laws, and such paper currency as there was in the country consisted wholly of notes issued by these state and local banks. Naturally the amount of such money fluctuated greatly from time to time; and its value, depending not only on the quantity issued but also on the resources and reputation of the institutions behind the notes, varied widely, both from state to state and in different parts of the same state. One of the principal reasons, therefore, for the creation of a national banking system in 1863, in addition to the desire to provide a market for government bonds, was to supplant these heterogeneous bank notes with a currency resting upon national authority, backed by the resources of the nation, and enjoying a uniform value throughout the country. With this end in view, Congress passed the national banking acts of 1863 and 1864, which constitute the legal foundation of the present system of national banks.[1] The new banks were empowered to issue notes designed to circulate as money; and, in order to drive out of circulation the rival notes of state banks, the latter were subjected to a ten per cent tax, which no bank could afford to pay. Indirectly, therefore, the new banks were given a monopoly of the right to issue notes, a privilege which they enjoyed uninterruptedly until the creation of the federal reserve system in 1913.[2]

Defects of the system

A half-century of experience with this national banking system showed that although it had many and obvious merits, the provisions of the law were too rigid in several respects, and, in times of business depression, positively harmful. For example, the amount of notes which a bank could issue was regulated by a hard and fast rule, based upon the amount of United States bonds which the bank owned and kept on deposit with the comptroller of the currency in Washington. This worked in such a way that when business was brisk, demanding a large volume of notes for its transactions, bonds would be too high in price to be profitably purchased by the banks as a basis for additional note issues; indeed, high prices might have just the opposite effect and lead banks to sell their government bonds, and thus actually reduce their note circulation. Note issues were thus inelastic and not responsive to commercial needs. There was a corresponding inelasticity of credit, even for borrowers who could offer perfectly good security. This

[1] *U. S. Compiled Statutes* (1918), pp. 1562-1580. The number of national banks in existence June 30, 1921, was 8,154.

[2] Since 1913 the federal reserve banks have shared this right, and it is expected that their notes will gradually supersede all those which have been issued by the ordinary national banks.

was traceable in part to the defect just mentioned, in part to the rigid requirements regarding reserve funds, and in part to restrictions which prevented national banks from lending money on real estate mortgages. All these, and some minor, defects stood clearly revealed in the "panic" of 1907, and eventually resulted in the passing of the act of 1913 creating the federal reserve system.[1]

Federal reserve system, 1913

By this law the country is divided into twelve great districts in each of which there is a federal reserve bank, commonly located in the district's principal city.[2] Unlike the national and state banks, these federal reserve banks do no business directly with the general public, but only with the "member banks," comprising all the national banks of the district and such state banks as have voluntarily become members of the federal system. The reserve banks obtain their funds in part from the member banks, which are obliged to maintain certain reserves with the reserve bank of their district, and also by serving as the legal depositories of the funds belonging to the national government. Their capital stock (not less than $4,000,000), is subscribed by the national and state banks in the district, or, in a few cases, by the national government and the general public. National banks are now allowed to issue, in addition to their notes based on government bonds, other notes based on such resources as currency, securities, and commercial paper deposited with the federal reserve bank of their district. The amount of such reserve fund, however, is not rigidly prescribed as formerly, but may be adjusted to meet general or local business conditions, and also the character of the management as well as the resources of individual banks. These arrangements, together with more elastic provisions regulating the acceptance, discount, and re-discount of commercial paper, have done much to impart increased flexibility to credit.

Unification of the federal reserve and national banking systems throughout the country is secured through a central body, called

[1] *U. S. Compiled Statutes* (1918), pp. 1581-1594. H. P. Willis, "The Federal Reserve Act," *Amer. Econ. Rev.*, IV, 1-24 (Mar., 1914), and "The New Banking System," *Pol. Sci. Quar.*, XXX, 591-617 (Dec., 1915); J. L. Laughlin, "The Banking and Currency Act of 1913," *Jour. Pol. Econ.*, XXII, 293-318, 405-435 (April and May, 1914); E. E. Agger, "The Federal Reserve System," *Pol. Sci. Quar.*, XXIX, 265-281 (June, 1914); T. H. Price, "The Amended Federal Reserve Law," *Outlook*, CXVI, 476-478 (July 25, 1917). On the congressional history of the Federal Reserve Act, see *Amer. Year Book* (1913), 38-53.

[2] The federal reserve cities are Boston, New York, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco.

Federal Reserve Board

the Federal Reserve Board, consisting of the Secretary of the Treasury and the comptroller of the currency *ex officio*, and five other salaried members appointed by the president and Senate for ten-year terms.[1] The head of the board bears the title of governor. In the hands of this body have been placed the supervision and control of the entire federal reserve system of the country and some measure of control over the national banks as well—a sum total of power which enabled it to play an exceedingly important part in stabilizing financial conditions during the World War and the years of readjustment immediately following the armistice.[2] The federal reserve bank in each of the twelve districts is controlled by nine directors, six chosen by the "member banks" and three appointed by the Federal Reserve Board.

Federal Land Banks

The national banks and the federal reserve system have been developed primarily to meet the needs of the commercial and industrial elements, and until Congress passed a farm loan act in 1916, little was done to meet the special demand of the agricultural sections for better credit and banking facilities.[3] Under this farm loan measure the country has been divided into twelve districts, each containing a federal land bank whose original capital was subscribed either by private individuals and corporations or by the national and state governments. The banks lend money, not directly to individual farmers, but to organized groups called farm loan associations; and it is part of the plan that these associations shall ultimately own the banks' capital stock. Bonds are issued by the banks, based on farm mortgages secured by the credit of the local loan associations or by United States bonds, and these securities are guaranteed by all the land banks. With a view to exempting them from state and local taxation, the bonds are designated by law as "instrumentalities of the government of the United States." The administration of the farm loan act, including the detailed supervision of the operations of the land banks and local loan associations, is vested in a Federal Farm Loan Board, consisting of the Secretary of the Treasury, *ex officio* chairman, and

[1] In January, 1922, the Senate passed a bill providing for a sixth member, the object being to ensure representation of agricultural interests. At the date of writing the bill has not been acted on by the House.

[2] The comptroller of the currency continues to have some separate supervisory power over the national banks.

[3] *U. S. Compiled Statutes* (1918), pp. 1599-1615. P. V. Collins, "The Rural Credits Law as Enacted," *Rev. of Revs.*, LIV, 303-304 (Sept., 1916); G. W. Norris, "The Farm Loan Bill in Words of One Syllable," *Outlook*, CXIV, 69-87 (Sept. 13, 1916).

CHAP. XXVII

four other salaried members appointed by the president and Senate for a term of eight years.

The currency

One other important phase of national finance calls for brief consideration, namely, the currency. Prior to the Revolution, the colonies were not forced by any controlling hand to adopt uniform monetary laws; and as a result English, French, Spanish, and even German, coins of various and uncertain values passed from hand to hand. The same confusion characterized the metallic money of the Revolutionary period and constituted a serious obstacle to trade, while affording endless opportunities for fraud and extortion. Even the Articles of Confederation did little to improve a situation which was rapidly becoming intolerable when they went into effect. Congress, to be sure, was given power to regulate the alloy and value of coins struck either by its authority or by that of the states. But only a limited amount of money was coined by the national government, and the latter's control over state coinage amounted, in practice, to little. To the confusion arising from this situation was added the chaos produced by voluminous and rapidly depreciating issues of paper money. Prior to 1776 the restraining hand of the home government tended to keep such issues within bounds. But when this influence was removed both the states and the Continental Congress began pouring forth issue after issue of paper largely or entirely unsupported by specie. By 1781 the country was financially demoralized; by 1787 business could hardly be carried on at all.[1] It is therefore not surprising that the framers of the constitution decided to put into that instrument provisions adequate to insure a uniform national currency; and to this end, Congress was expressly granted authority to "coin money [and] regulate the value thereof,"[2] while at the same time the states were forbidden to coin money, emit bills of credit, *i.e.*, paper money, and make anything but gold and silver coin legal tender in the payment of debts.[3]

Chaotic condition before 1789

In pursuance of the power given it, Congress enacted, in 1792, the first law providing for a truly national currency. Following the recommendations of Alexander Hamilton, secretary of the treasury, it adopted the now familiar decimal system of values instead of the cumbersome English system. At the same time, it

[1] For a graphic account see J. Fiske, *Critical Period of American History*, 163-186.

[2] Art. I, § 8, cl. 5.

[3] Art. I, § 10, cl. 1.

authorized the use of both gold and silver coins, which became a fixed feature of our monetary system.

Paper money

Subsequently—notably in the decade after the Civil War and in the closing decade of the century—the power expressly granted to Congress to "coin money" and to "regulate the value thereof" gave rise to important currency questions in our national politics, especially in the form of "greenbackism" and a demand for the free and unlimited coinage of silver. The latter proposal raised no controversy as to constitutional authority; the question was simply one of wisdom and expediency. But the "greenback" issue involved grave questions of constitutional law. Until the Civil War, the only paper currency in the country, as has been pointed out,[1] consisted of state bank notes and the notes issued by the first and second Banks of the United States during the periods 1791-1811 and 1816-1836. To meet the emergency created by that conflict, Congress passed several acts authorizing the issuance of paper money and making the new currency legal tender for the payment of private debts. Inasmuch as the constitution contains no clear grant of power for such legislation, and since it was known that the framers of that instrument definitely rejected a proposal to include such authorization among the powers expressly granted, it was not long before the right of Congress was challenged in the courts, and eventually in the Supreme Court, in an important series of actions usually called the Legal Tender Cases. In deciding the questions which these cases raised, the Supreme Court at first denied, but subsequently firmly upheld, the right of Congress to make paper money legal tender for private debts.[2]

Legal tender cases

Derivation of the legal tender power

This authority is a good illustration of "resulting", as distinguished from implied, powers. The power is not expressly granted to Congress; nor can it be readily implied from any one of the express powers, unless it be the power to borrow money on the credit of the United States. Its existence is rather to be deduced from a combination of several powers expressly granted—indeed from the general aggregate of powers conferred. It is deducible from the fact that Congress is the legislature of a sovereign nation and that the power to make the notes of the government legal tender in payment of private debts is one of

[1] See p. 427.

[2] Hepburn *v.* Griswold, 8 Wall., 603 (1870); Knox *v.* Lee, Parker *v.* Davis, 12 Wall., 457 (1871); Juilliard *v.* Greenman, 110 U. S., 421 (1884).

CHAP. XXVII

the powers belonging to sovereignty in other civilized nations, and is not expressly withheld by our constitution. It is deducible also from the fact that it is an appropriate means to the execution of the unquestioned powers of Congress to lay and collect taxes, to carry on war, to borrow money, and to regulate the currency. At all events, after the last of the legal tender cases was disposed of, in 1884, all doubt as to the power of Congress to issue paper money and impress upon it the legal tender character vanished.[1]

Other forms of currency

Several varieties of paper money, in addition to the greenbacks, are now in circulation, namely, silver certificates and treasury notes, based upon silver coin and bullion in the treasury; gold certificates, based upon gold coin and bullion in the treasury; federal reserve notes, which are gradually being substituted for the gold certificates; national bank notes, and the federal reserve bank notes. The balance of our national currency consists of gold coin in denominations of from two and one-half dollars (quarter eagles) to twenty dollars (double eagles),[2] silver coin (dollars, half-dollars, quarters, and dimes), and subsidiary coins, *i.e.*, nickels and cents. Paper money is manufactured in the bureau of engraving and printing at Washington; coins are made at four mints, located at Philadelphia, Denver, San Francisco, and New Orleans.

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[1] There is also judicial sanction for deriving the power from the right to coin money; on this point see Dewey, *Financial History of the United States*, 70. Cf. Willoughby, *Constitutional Law of the United States*, I, 626-628.

[2] Gold dollars were coined in 1849-1889.

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CHAPTER XXVIII

THE REGULATION OF COMMERCE

Origin of the commerce clause

Lack of power to control the conditions under which trade was carried on with foreign nations and among the several states was a main defect of the Articles of Confederation; and, as we have seen, it was a controversy between states on this subject that led to the Annapolis convention of 1786, and ultimately to the Philadelphia convention which framed the constitution in 1787.[1] The peaceful development of commerce, both domestic and foreign, on equitable and harmonious lines, was recognized as a prime requisite of national stability and growth. Accordingly, the new constitution was so drawn as to give Congress general power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[2] Indeed this grant of power stands second in the list of powers given to Congress, the first being that of raising money by taxes and loans.

Limitations

Only four limitations are imposed: (1) the foreign slave-trade was not to be prohibited before 1807; (2) no tax or duty might be laid by Congress on articles exported from any state; (3) no preference was to be given by any regulation of commerce or revenue to the ports of one state over those of another; and (4) vessels bound to or from one state should not be obliged to enter, clear, or pay duties in another state. The first of these restrictions was only temporary, and the third and fourth have operated merely to prevent discrimination against the commerce of any state or group of states. Only the second—which was a concession to the southern exporters of agricultural products designed to shield them from the burden of a tax whose weight was supposed to fall on the exporter himself—has proved a serious limitation upon congressional regulative authority. Export taxes, if allowed, might have been employed at times not only to obtain revenue but to conserve natural resources by checking shipments of lumber, oil, coal, and other products out of the country. There is, however,

[1] See p. 126.

[2] Art. I, § 8, cl. 3.

nothing in the constitution to prevent regulation of the export trade by Congress in any way other than by taxation.

Importance of national control over commerce

Probably no single clause of the constitution has contributed so much to the expansion of the power of the national government, especially in the past fifty years, as the commerce clause. Apart, furthermore, from the taxing clause, no grant of power has had so much to do with establishing the close relation now existing between government and business—a relation which is likely to grow more, rather than less, intimate as the commercial enterprises of our people increasingly transcend state boundaries.[1] It is one of the marvels of our governmental system that a constitution drawn up to meet the simple needs of the eighteenth century, when pack-horses and sailing vessels were the main agencies of transportation, and when railroads, steamships, telegraphs, and telephone and wireless systems were as yet undreamed of, should have proved adequate to enable Congress to deal with the infinitely more complex commercial activities of the twentieth century without the alteration of a single word or phrase pertaining to trade regulation. The explanation is to be found in the broad interpretation which the Supreme Court from time to time has given to the words "commerce" and "regulate." Beginning with the famous case of Gibbons *v.* Ogden [2] in 1824, the court has so expanded the application of these terms in successive decisions (which have almost exactly synchronized with the great advances in the modes of commerce and communication) that the regulative powers of Congress have kept pace fairly well with the nation's requirements.

Meaning of "commerce"

In one important case or another, for example, the Court has decided that the term commerce includes not only the exchange of commodities but such varied forms of intercourse as navigation, the maintenance of toll-bridges or ferries for passengers crossing rivers separating two states, the transportation of persons as well as animals and goods, and even the transmission of intelligence by means of telegraphic, telephonic, or wireless messages. Over all of these matters the regulating power of Congress extends. Furthermore, Congress not only may regulate all the instrumentalities of commerce, but may itself create corporations to serve as such instrumentalities. In short, as a result of judicial decisions,

[1] This growing relation, in turn, partly explains why questions which are primarily economic rather than political in the strict sense have come to be the overshadowing issues in national politics since the close of the Reconstruction period. See pp. 531-538.

[2] 9 Wheaton, 1.

CHAP. XXVIII

congressional authority may be said to extend to all forms of traffic and intercourse between the inhabitants of the United States and of foreign countries and between inhabitants of the different states. It is to be noted, however, that transactions are not to be regarded as commercial from which the element of transportation is lacking. Agriculture, mining, fishing, and manufacturing are not regarded as commerce, and are not subject to congressional regulation. On the other hand, there are transactions which seem, to the layman at all events, to be quite as closely related to commerce as some of the things which have been held to be included in that term, but which the Supreme Court has thus far regarded only as incidents or aids to commerce and not as themselves commercial acts or instrumentalities. For example, the buying and selling of bills of exchange has been held not to be commerce; likewise the issuing of fire, marine, or life insurance policies, or other contracts.[1]

Main divisions of the power over commerce

Along with the power to regulate foreign and interstate commerce, Congress is given authority to regulate commerce with the Indian tribes. This grant was of some importance in our early history, but it may now be passed over with the barest mention. Of far greater significance are those phases of congressional authority which have to do with the regulation of commerce (a) with foreign nations and (b) among the several states, and each of these will be given somewhat detailed treatment in the remainder of this chapter.

Foreign relations and the power over commerce

Although these grants of power are conferred in the same terms, the scope of congressional authority over foreign commerce is in reality the broader of the two. This is explained by the fact that the national government has exclusive, and practically unrestricted, jurisdiction over our relations with foreign nations, and this jurisdiction serves in no small measure to reinforce or supplement the authority granted by the commerce clause.[2] Thus, for example, the laws controlling the immigration of aliens may be upheld either as regulations of foreign commerce or as expressions of the national government's exclusive control over foreign relations. A similar dual legal foundation underlay the creation, during the recent war, of the War Trade Board, to which was given

[1] W. W. Willoughby, *Constitutional Law of the United States*, II, Chap. XLII. See also J. M. Beck, "The Federal Regulation of Life Insurance," *No. Amer. Rev.*, CLXXXI, 191-201 (Aug., 1905).

[2] Willoughby, *op. cit.*, II, 769.

jurisdiction over practically all foreign trade and also authority to control exports to foreign countries.[1]

Congressional authority to regulate commerce with foreign nations attends and surrounds every voyage, or other act of transportation, across the national boundaries, even though commencing or terminating within the boundaries of a state; and inasmuch as the constitution denies to the states the right to tax imports, congressional authority continues to operate so long as imported articles remain in the unbroken original package. Only when the package has been broken and the articles therein have become commingled with the ordinary property of the citizens of the state does the controlling authority of Congress cease, and that of the state begin.[2]

Acts regulating foreign commerce

In the exercise of this regulatory power Congress has passed many kinds of laws, of which only a few of chief importance can be mentioned here.[3]

1. Embargoes

Under the power to "regulate" foreign commerce, Congress has, on several occasions, gone so far as to attempt temporarily to put an end to such commerce, wholly or partially, by authorizing the establishment of embargoes. This policy has usually been adopted in anticipation of, or in connection with, war with some foreign power.[4]

2. Tonnage duties

Another species of regulation has taken the form of tonnage duties,[5] or taxes based upon the cubical capacity of vessels arriving in American ports from foreign countries. Fiscal motives have been less conspicuous in such regulations than the desire to aid

[1] It should be observed in this connection that there is a possibility of conflict between the treaty-making organs and Congress over the regulation of foreign commerce. Although the matter appears to have been placed exclusively in the hands of Congress, treaties may contain provisions tantamount to regulations of commerce and even inconsistent with existing tariff laws. Congressional power over foreign commerce is farther reinforced by the clause which authorizes Congress to define and punish piracies and felonies on the high seas (Art. I, § 8, cl. 10).

[2] Brown *v.* Maryland, 12 Wheaton, 419 (1827). See J. P. Hall, *Constitutional Law*, 274-282.

[3] Most of the laws regulating foreign commerce which are now in force may be found in *United States Compiled Statutes* (1918), pp. 1217-1352.

[4] Embargoes were laid in 1794, 1807-08, and 1812; also during the recent World War upon commerce destined for neutral countries whose neutrality was suspected.

[5] The constitution expressly forbids states to levy tonnage duties without the consent of Congress. Such permission was, however, granted in numerous instances in the early history of the country for the purpose of enabling the states to improve their harbors. When the national government assumed the work of harbor improvement, construction of light-houses, buoys, etc., the occasion for granting such privileges ended.

American shipping, either by imposing heavier duties upon ships built or owned in foreign countries than upon American vessels, or by imposing discriminating duties upon foreign goods imported in any but American vessels. Occasionally, also, such duties have been resorted to by way of retaliation for discriminations against American ships or trade by foreign countries. Where this has been the principal motive, the president has usually been authorized to suspend the duties when discrimination against American ships or goods could be shown to have ceased. An act of 1909 imposed a duty of two cents a ton (not to exceed ten cents in any one year) at each entry of vessels from any foreign port in North and Central America, the British West Indies, or the northern part of South America. A duty of six cents per ton (not to exceed thirty cents in any one year) was imposed on vessels from other foreign ports; and there was also levied an annual tonnage tax upon foreign-built vessels or yachts used for pleasure purposes.[1]

3. Navigation and inspection laws

Navigation and inspection laws, enacted by the first Congress and on numerous occasions since, form perhaps the largest and most varied single class of strictly commercial regulations.[2] Chief among the varied purposes of these statutes have been protection of American shipping, stimulation of shipbuilding, safeguarding the health and safety of passengers, and insuring the safety and rights of seamen. All vessels owned by American citizens must be registered in the bureau of navigation in the Department of Commerce, and must have a license; and no American ship may sail for a foreign port without first securing a passport to be deposited with the United States consul upon arrival at its destination. Other laws, designed to protect the health and safety of passengers, fix a minimum number of cubic feet of space to be provided for each person, require the installation of sanitary appliances, and provide for the examination and licensing of pilots, engineers, masters, and mates. Still other enactments, notably the LaFollette seamen's act of 1915, define and regulate in great detail the respective rights and duties of officers and seamen.[3]

Federal Shipping Board and Emergency Fleet Corporation

As a spur to shipbuilding, the government has sometimes granted subsidies, directly or indirectly, to private companies. The most important step of this kind was taken in 1916 when

[1] *U. S. Compiled Statutes* (1918), pp. 1232-1235.

[2] *Ibid.*, pp. 1217-1332.

[3] Many, and probably the greater part, of these regulations also apply to coasting vessels and to shipping on the Great Lakes, if engaged in interstate commerce.

Congress created the Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and a merchant marine.[1] To this agency, consisting of five members appointed by the president and Senate for a maximum term of six years, powers were given approximating those enjoyed by the Federal Trade Board and the Interstate Commerce Commission over domestic trade and transportation.[2] The Shipping Board was also authorized to have vessels constructed in American shipyards and elsewhere, and to purchase, lease, and charter vessels suitable for use as naval auxiliaries in time of war. After the United States entered the European conflict, in 1917, the Emergency Fleet Corporation was organized under the Shipping Board. This was a private corporation, having a capital stock of fifty million dollars subscribed by the Shipping Board; to it the Board delegated its powers in respect to the acquisition and operation of vessels, thus enabling it to play an important part in our prosecution of the war. Ships already in service were requisitioned, and in many cases operated by their owners under charters from the Emergency Fleet Corporation; while in other instances the ships were operated by the Corporation itself through a special operating department. Immense shipyards were also set up, and when the armistice was signed the Corporation had constructed, or had in process of construction, hundreds of ocean-going vessels.[3]

War Finance Corporation

Shortly after the armistice, Congress, with a view to promoting the export trade of the country, revived the War Finance Corporation,[4] which it had created for the financial assistance of concerns whose operations were deemed essential to the successful prosecution of the war, and clothed it with entirely new powers. With a capital stock of five hundred millions, the Finance Corporation is now empowered to make short-term loans aggregating a billion dollars to aid persons, firms, or corporations engaged in the export business. The affairs of this organization are managed by a board of directors consisting of the Secretary of the Treasury and four other persons appointed by the president and Senate.

[1] W. G. McAdoo, "Wanted: American Ships," *Outlook*, CXIII, 326-330 (June 7, 1916); P. H. W. Ross, "The American Merchant Marine," *ibid.*, CXIII, 137-142 (May 17, 1916); *Amer. Year Book* (1918), 52-56; *ibid.* (1919), 598-601.

[2] See pp. 447, 452.

[3] *U. S. Compiled Statutes* (1918), pp. 460-463; *Congressional Directory*, 67th Cong., 2nd Sess., 372-374 (Dec., 1921).

[4] W. F. Willoughby, *Government Organization in War Time and After*, Chaps. VI-VII.

CHAP. XXVIII

4. Protective tariffs

Tariff laws are the regulations of foreign commerce with which the ordinary citizen is probably most familiar. When the main object of such laws has been the protection and stimulation of home industries, rather than the production of revenue, their legal justification is to be found quite as much in the power to regulate foreign commerce as in the taxing power of Congress.[1]

5. Immigration laws

Laws which restrict or otherwise regulate foreign immigration into this country have, similarly, a two-fold legal basis. Over all matters relating to immigration the national government has exclusive jurisdiction,[2] both by reason of the power granted in the commerce clause and also by virtue of the fact that such jurisdiction is an incident of the power of a sovereign government to control its own foreign relations.[3] Not until 1882, however, did Congress definitely embark upon a policy of restricting the admission of aliens into the country, and of even excluding certain ones altogether. Legislation aimed at exclusion has since that date been based upon the principle of denying admission to aliens who are physically, morally, and economically below certain standards. The first law (1882) excluded only idiots, escaped convicts, and persons likely to become public charges. As successive measures were passed, the debarred classes were steadily enlarged until, under the law of 1917, no fewer than thirty grounds of exclusion were enumerated. Chief among the classes debarred are criminals, paupers and persons likely to become public charges, persons afflicted with contagious or infectious diseases, persons of unsound mind, anarchists, Chinese coolies, and contract laborers. The last have been excluded since 1885 at the behest of organized labor. Altogether, these restrictions have operated to keep out of the country from two to eight per cent annually of the aliens applying for admission. A long agitation for a literacy test finally led Congress to enact, in 1917, over the veto of President Wilson, a law adding to the foregoing classes persons who cannot read the English language or some other language or dialect.[4]

Act of 1921

In 1921 farther legislation resulted from the apprehension that, owing to post-war conditions in Europe, the stream of immigration

[1] Tariff legislation has been considered more fully elsewhere. See pp. 415-418.

[2] *Passenger Cases*, 7 Howard, 283 (1848).

[3] *Chinese Exclusion Cases*, 130 U. S., 581 (1889); 149 U. S., 698 (1893); also W. W. Willoughby, *Constitutional Law of the United States*, II, 1286-1293.

[4] *U. S. Compiled Statutes* (1918), pp. 632-652.

which had almost ceased to flow during the war, would soon swell to dangerous proportions. Congress now established a new standard of exclusion, based upon the number of immigrants already in the country. Under this law, the total number that may be admitted annually from any country cannot exceed three per cent of the number of persons of that nationality who were in the country when the census was taken in 1910; and it was computed that the number of admissible immigrants would be reduced to about 360,000 a year, whereas in some years preceding the war the number exceeded a million. The law is admittedly a makeshift, intended only to stop the gap until some permanent immigration policy can be formulated and agreed upon; and it will expire by self-limitation on June 30, 1922, unless before that date Congress prolongs its operation.[1]

Immigration officials

The administration of the immigration laws was originally left mainly to state officials. Since 1891, however, the work has been assigned to immigration inspectors stationed at all ports of entry and working under the supervision of a commissioner-general of immigration, who is at the head of the bureau of immigration placed in 1913 in the Department of Labor.[2] Immigrants who consider that they have been unjustly denied admission to the country may appeal ultimately to the Secretary of Labor, whose decision, in most cases, is final.[3] The authority of the commissioner-general was greatly enlarged in 1918 by an amendment to the immigration law authorizing him to expel from the country alien revolutionists, anarchists, advocates of sabotage, violence, or assassination, and other aliens who aid and abet them. Under this grant of authority was carried out the sensational deportations to Russia of the so-called "Reds" in 1919. Persons debarred for any reason under the laws are transported back to the country from which they came at the expense of the steamship company which brought them over.

Interstate commerce

From what has been said one may obtain some idea of the importance and varied ramifications of the power granted to Congress to regulate foreign commerce. But of even greater importance, especially in the development of the powers of the

[1] W. W. Husband, "How Restricted Immigration Works Out," *Curr. Hist.*, XV, 604-609 (Jan., 1922).

[2] See p. 330.

[3] See L. F. Post, "Administrative Decisions in Connection with Immigration," *Amer. Polit. Sci. Rev.*, X, 251-261 (May, 1916).

CHAP. XXVIII

national government, has been the coördinate grant of power to regulate commerce "among the several states," usually called interstate commerce. To this matter we now turn.

Definition

The regulation of commercial transactions which are begun, wholly carried on, and completed within a single state falls exclusively to the authorities of that state. But the moment such a transaction crosses the boundary between two states it ceases to be intrastate commerce and becomes interstate commerce. Even a shipment of goods or a railroad journey beginning and ending in a single state becomes an interstate transaction, subject to congressional regulation, if at any point in the journey a state boundary line is crossed. Not only does the interstate character attach to a shipment of goods the moment it is delivered by the shipper at the freight-office, warehouse, or depot of a common carrier, *i.e.*, a railroad, steamship, or express company, but it continues to adhere to the transaction throughout the entire journey and until the goods have been delivered to the consignee. Only when the goods have been taken from the original package in which the shipment took place and have been commingled with the general mass of property of the state to which they have been transported do the authorities of that state have the right to tax them or otherwise to regulate their sale or use.[1] It is substantially correct to say that Congress enjoys *exclusive* authority to regulate interstate commerce, and that this authority reaches to water-borne commerce as well as to commerce carried on by land or partly by land and partly by water; indeed, wherever navigable waters form, either in their natural condition or by artificial union with other waters, a continuous highway over which commerce is carried on between two or more states, or with a foreign country, they become "navigable waters of the United States," whose use Congress may control as an incident to the power to regulate foreign and interstate commerce.[2] But congressional power over interstate commerce does not stop here. It extends also to persons who, or corporations which, make a business of transporting articles or persons from state to state, and likewise to their relations with their employees engaged in interstate transportation; and this explains why Congress may legally require railway companies to install block-signal systems, to equip their trains with safety appliances,

Scope of national control

[1] W. W. Willoughby, *Constitutional Law of the United States*, II, 643-665; J. P. Hall, *Constitutional Law*, 283-289.

[2] Willoughby, *op. cit.*, II, 768.

to limit the number of hours of labor per day of their employees, and to grant these employees compensation when they are injured in the course of their employment.

Corporations created by the government

Although the bulk of interstate commerce is carried on by private persons, firms, and corporations, the national government has the undoubted right to engage in commerce itself, and, therefore, to create and control companies for the construction and operation of highways, bridges, canals, railroads, and other instrumentalities of commerce.[1] Under such authority, and backed by the financial resources of the national government, the construction of the first transcontinental railroad was begun during the Civil War. While the national government may thus create corporations whose primary purpose is to engage in interstate commerce, it may not charter those whose main business is manufacturing, nor regulate conditions under which manufacturing is carried on.[2] It does have authority, however, through Congress, to require manufacturing corporations chartered under state laws to take out a federal license before engaging in interstate commerce, and it may lay down conditions which must be fulfilled as a prerequisite to the granting of such licenses. Some fifteen years ago, this idea of a federal license for state corporations was widely advocated as an effective means of preventing monopolies and unfair practices between competitors engaged in interstate commerce; but no national legislation establishing such a system has yet been enacted.[3] Upon other phases of interstate commerce, however, Congress has enacted a large amount of legislation, although this has never taken the form of an elaborate and systematic commercial code; on the contrary, it has been decidedly fragmentary and miscellaneous.[4]

Early laws affecting interstate commerce

During practically the first hundred years under the constitution no laws were passed which could be regarded, speaking strictly, as regulations of interstate commerce. To be sure, appropriations and land grants were made from time to time for internal improvements, as they were then called, including the establishment and maintenance of lighthouses and buoys, the dredging of

[1] W. W. Willoughby, *Constitutional Law of the United States*, II, 763.

[2] H. Hull and T. I. Parkinson, "The Federal Child Labor Law: the Question of Its Constitutionality," *Polit. Sci. Quar.*, XXXI, 519-540 (Dec., 1916); T. R. Powell, "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," *Southern Law Rev.*, III, 175-202 (Aug., 1918).

[3] S. D. M. Hudson, "Federal Incorporation," *Polit. Sci. Quar.*, XXVI, 63-97 (Mar., 1911).

[4] *U. S. Compiled Statutes* (1918), pp. 1352-1458.

CHAP. XXVIII

rivers and harbors, the construction and up-keep of highways, turnpikes, and bridges, and the building of canals and, eventually, railroads. But regulatory provisions were almost entirely absent, and the constitutionality of such appropriations, except those for river and harbor improvements, was quite as often upheld under the postal and war powers of the government as under the commerce clause.[1]

River and harbor legislation

Of these objects of national expenditure, only river and harbor improvement calls for more than passing notice here. Along with the sums appropriated from time to time for perfectly worthy undertakings involving the improvement of harbors on the coast and of the larger rivers of the interior, millions of dollars have been wasted, as a result of log-rolling, upon utterly worthless enterprises. Most members of Congress have been eager to obtain expenditures of national funds within their respective states and districts, in the hope of enhancing their popularity with constituents and thereby ensuring their reëlection. Accordingly, the river and harbor appropriation bill, which appears in Congress biennially, has come to be regarded as one of the most flagrant instances of pork-barrel legislation, a reputation which places it in the company of appropriation bills for public buildings and private pensions. Prior to the Civil War, appropriations for this purpose were, indeed, kept down to a comparatively low figure, the total for that long period amounting to less than fifteen million dollars. Since then, however, single river and harbor bills have carried items aggregating between thirty and fifty millions.[2] The preparation of such bills has hitherto been in the hands of the committee on rivers and harbors, and it is to be hoped that the introduction of improved budgetary methods and the concentration of authority over appropriations in the hands of a single committee will result in large savings at this point to the national treasury.[3]

The Interstate Commerce Act (1887)

Aside from river and harbor bills, little national legislation affecting interstate commerce was enacted until within the past thirty-five or forty years. Railroads naturally took on an interstate character at an early stage of their development; but regulation of their operations was long left entirely to the states. Only

[1] McLaughlin and Hart, *Cyclopedia of American Government*, II, 202.

[2] H. B. Fuller, "American Waterways and the Pork Barrel," *Century Magazine*, LXXXV, 386-396 (Jan., 1913).

[3] See p. 423.

after the Civil War, when railway building set in on a greatly enlarged scale and the inadequacy of state regulation became increasingly manifest, was a movement started for national control. One plan looked to detailed regulation of rates and services directly by Congress; and for ten years after 1878 a bill of this general purport appeared in the House of Representatives at practically every session. A less radical proposal was to create a commission, on the analogy of various state commissions,[1] with power to gather information, hear complaints, and make detailed application of such general rules as Congress should lay down; and after long wavering between the two policies, Congress adopted the latter, in 1887, being impelled to come together quickly on some plan by a startling decision of the Supreme Court in the Wabash case in the preceding year, to the effect that no state had a right to adopt regulations affecting the movement of commerce among the several states.[2] The resulting measure, known as the "Act to Regulate Commerce," became the first of a long series of national statutes regulating railways and other public service corporations, with a view to preventing excessive charges, discriminations, and other unfair practices; and it both laid down principles and rules which these corporations must observe and created a commission to administer the restrictions and enforce obedience.

Scope of regulation

With numerous amendments which have greatly enlarged its original scope, the act of 1887 now applies to all interstate commerce carried on by railroads, by steamboat lines which form part of a system of railway transportation, by express companies, by sleeping-car and other private car lines, and by pipe lines, except those for the transportation of gas and water. It applies likewise to bridges, ferries, car-floats, and lighters, to all terminal and transportation facilities used in the interstate transportation of persons and freight, and to all instrumentalities and facilities used for the transmission of intelligence by means of electricity, such as telegraph, telephone, cable, and wireless companies. Upon all corporations operating any of these instrumentalities of public service, and especially upon carriers,[3] numerous restrictions are imposed, each of which reflects some earlier abuse. Thus, (1)

[1] The first such body was the Massachusetts Railroad Commission, created in 1869. By 1885 there were similar agencies in thirteen states.

[2] Wabash, etc., Railway Co. *v.* Illinois, 118 U. S., 557 (1886).

[3] *U. S. Compiled Statutes* (1918), pp. 1352-1389.

CHAP. XXVIII

Restrictions imposed on carriers

rates for the transportation of persons and freight and for the transmission of messages must be just and reasonable; (2) rebating, directly or indirectly, and undue discrimination or preferences between persons or localities are prohibited under severe penalties; (3) charging a higher rate for a short haul than for a long one over the same line in the same direction is prohibited, except in certain special instances, when authorized by the Interstate Commerce Commission; (4) free transportation may be granted by carriers only to narrowly restricted classes of persons; (5) railroad companies may not transport commodities, except timber and its products, in the production or manufacture of which they have a direct property interest; (6) pooling of freights by competing railways was prohibited until 1920, when the law was amended so as to empower the Interstate Commerce Commission to authorize pooling arrangements under certain conditions; (7) common carriers are prohibited, except in a few special cases, from operating, owning, or controlling, or having any interest in, any competing carrier by water; (8) carriers are prohibited from issuing stocks, bonds, or other securities without the previous consent of the Interstate Commerce Commission.

Duties imposed

In addition to these restraints, numerous positive duties also have been imposed. For example, (1) printed schedules of rates must be kept open for public inspection, and changes therein may be made only after permission has been granted by the Interstate Commerce Commission; (2) to this Commission full and complete annual reports must be made, covering such matters, and arranged in such form, as the Commission prescribes; (3) all accounts must be kept according to a uniform system, authorized by the Commission; (4) in case of injury to any of its employees, a carrier must grant pecuniary compensation, unless the accident was caused by the wilful act or negligence of the injured party; (5) carriers are prohibited from employing, in interstate commerce, despatchers and trainmen longer than nine and sixteen hours, respectively, within any period of twenty-four hours; (6) eight hours has been fixed as a standard or basic work-day for railway employees engaged in the operation of trains, and carriers are obliged to conform their wage schedules to this standard, and to grant overtime pay for work done in excess of eight hours;[1] (7) railroad

[1] T. R. Powell, "The Supreme Court and the Adamson Law," *Univ. of Penn. Law Rev.*, LXV, 1-27 (May, 1917).

companies are required to equip all trains engaged in interstate commerce with automatic safety-appliances.

Interstate Commerce Commission and its jurisdiction

The frequent mention of the Interstate Commerce Commission —which is the administrative board charged with the enforcement of all regulations just indicated, and of innumerable minor ones as well [1]—suggests that the effectiveness of the regulations depends in a large degree upon the integrity, independence, and individual efficiency of members of the Commission, upon their knowledge of the facts involved in the highly intricate and technical problems coming before them, and especially upon the wisdom with which they use their discretionary authority in applying the laws so as not only to benefit the general public but at the same time to work no real injustice to the carriers and other corporations concerned. The Commission, as we have seen, was established by the original regulating act of 1887. For a long time it had practically no jurisdiction save over railroads engaged in interstate commerce. But in 1906 express and sleeping-car companies and the owners of pipe lines, except those for the transmission of gas and water, were brought under its control.[2] In 1910 its jurisdiction was extended to embrace corporations operating cable, telegraph, telephone, and wireless systems. In 1913 it was instructed to institute and supervise the huge task of making an inventory, or "physical valuation," of all property in the country belonging to interstate carriers. And still more recent legislation has authorized it to prepare and adopt, as soon as practicable, a plan for the consolidation of railway properties into a limited number of systems—a project which is admittedly a step in the direction of a possible future creation of consolidated regional transportation systems, with partial decentralization in their supervision and control.[3] Still other statutes, notably the Clayton Anti-Trust Act of 1914 and the Transportation Act of 1920, have materially added to the Commission's duties and responsibilities. As a result of this steady augmentation of activities, the Commission has been increased from five to seven, nine, and finally eleven, members, and a staff of some nine-

[1] For a more extended summary of the duties of the Commission, see *Congressional Directory*, 67th Cong., 2nd Sess. (Dec., 1921), 355-361.

[2] F. H. Dixon, "The Interstate Commerce Act as Amended," *Quar. Jour. Econ.*, XXI, 22-56 (Nov., 1906).

[3] A "Tentative Plan of the Commission," published August 3, 1921, calls for nineteen great regional systems. For this plan and the report of Professor Ripley upon which it is based see 63 *Interstate Commerce Commission*, 455 ff. (1921).

CHAP. XXVIII

teen hundred persons—clerks, attorneys, examiners, statisticians, investigators, and technical experts [1]—has been built up. The commissioners themselves work mainly in Washington; yet they often go out, singly or in groups, to gather information and hold hearings in distant parts of the country.

Power over rates

Under the original law, the Commission did not claim power to make rates on its own initiative. Being called upon frequently, however, to decide whether rates charged by carriers were reasonable or unreasonable, it fell into the practice of prescribing, in given cases, what the rate should be; that is, it modified rates on complaint. Not unnaturally, this construction of its power was challenged by the interests adversely affected, and presently cases involving the question got into the courts. Two great decisions resulted. In the Maximum Freight Rate case of 1896 the Supreme Court held that the power to fix tariffs of rates for common carriers is legislative in character and cannot properly be exercised by an administrative commission unless expressly conferred upon it; [2] and in the Alabama Midland case of 1897 the Court nullified the "long and short haul" clause of the act of 1887 by denying the power of the Commission to establish the reasonableness of rates relatively as between competing places.[3] These rulings stripped the law of all its vigor, and, farther baffled by the dilatory and obstructive practices of the attorneys for the carriers, the Commission became almost powerless. For upwards of a decade, the future of the entire scheme of national regulation by commission hung in the balance. Ultimately, however,—although only after a vigorous campaign of popular education, and in the face of persistent opposition from the carriers,—the necessity of conferring upon the Commission extensive rate-making power was brought home to the national mind; and in the same act of 1906 which extended the Commission's jurisdiction to new forms of interstate commerce, the body was empowered, on complaint and after a hearing, to fix "just and reasonable" maximum rates, regulations, and practices. Some people wanted to endow the Commission with the same power to prescribe exact (rather than merely maxi-

[1] Especially in connection with the work of making the physical valuation of railways and with the block-signal and train-control board which has been organized as an auxiliary body, acting under the direction of the Commission.

[2] Interstate Commerce Commission *v.* Cincinnati, N. O., and T. P. Ry. Co. *et al.*, 167 U. S., 479.

[3] Alabama Midland Ry. Co. *v.* Interstate Commerce Commission, 168 U. S., 144.

mum) rates which certain state railroad commissions enjoyed. The railroads successfully opposed this plan, and to this day the Commission fixes only the maximum rates which are, in a given case, permissible.[1] This, however, is a very great power, and chiefly through its exercise the Commission has been brought into the position of the "economic supreme court of the American transportation world."

Procedure

Not only does the Commission enjoy quasi-judicial power in the determination of rates; it has extensive inquisitorial powers as well. It may investigate the manner in which the carriers and other corporations under its jurisdiction comply with the requirements of law; it may compel the attendance of witnesses and the production of evidence; and, through the Department of Justice, it may institute prosecutions for any violation of the law or failure to comply with the Commission's orders in enforcing the law. Rate-making proceedings assume substantially the character of proceedings in a court of justice; the various parties are represented by their attorneys, witnesses are examined, and documentary or other evidence is submitted. The decisions are embodied in rulings or orders, which are enforceable in the federal courts in proper proceedings; and to these courts appeals may be taken by parties adversely affected.

Value of the Commission

In spite of many obstacles interposed at different times by carriers and other corporations and by court decisions, the Commission has achieved valuable results, especially in the field of railroad regulation. Not the least of these has been the dissemination of knowledge of, and the stimulation of thought and discussion upon, railway affairs. "It has furthermore served as a stimulus to railway managements, and, at the same time, as a restraint upon them; has aided in raising the morals of the railway service; and, above all, has kept awake in the minds of railway men a sense of their obligation to the public."[2]

Statutes regulating carriers and means of communication constitute by far the larger of the two main classes of interstate

[1] An act of 1920 provides for the division of the railroads of the country into rate-making groups and requires the Commission to fix such maximum rates as will make the consolidated accounts of each group show a net income of five and one-half per cent on the combined property investment of the roads in the group.

[2] McLaughlin and Hart, *Cyclopedia of American Government*, II, 223. See also S. O. Dunn, "What is the Matter with Railway Regulation?" *No. Amer. Rev.*, CCII, 736-745 (Nov., 1915), and "Ten Years of Railroad Regulation," *Scribner's Magazine*, LX, 412-419 (Oct., 1916).

CHAP. XXVIII

Anti-trust laws

commerce regulations. But hardly second in importance are the comparatively few acts of Congress intended to prevent the growth of capitalistic combinations commonly spoken of as trusts.[1] For more than a hundred years the regulation of combinations which restrained trade was left entirely to the states; and whatever state action was taken rested either upon the old common-law principle that all combinations which restrain trade *unreasonably* are illegal or upon some specific statute modifying or defining the application of the common-law rule. The prevention or regulation of such combinations did not begin to be a serious problem, demanding something more than sharply conflicting decisions of state courts and widely varying state laws, until shortly before 1890. In that year Congress intervened for the first time, and, making use of its power over interstate commerce, passed the Sherman Anti-Trust Act, whose purpose was "to protect trade and commerce against unlawful restraints and monopolies," by declaring, in sweeping general terms, *every* contract, combination, or conspiracy in restraint of trade or commerce among the several states and with foreign nations to be illegal, and providing heavy penalties.[2]

The Sherman Act (1890)

Enforcement

No special agency, however, was created to administer this anti-trust act, and its enforcement naturally fell to the Department of Justice, along with the execution of a multitude of other statutes. The result was that the law remained almost a dead letter until the government successfully prosecuted the Northern Securities case in 1905. This case involved the legality of a holding corporation, created for the sole purpose of holding and voting the stock of two formerly competing railway systems. By this device it was hoped that, without violating the letter of the law, the former competitors would be enabled to operate substantially as a unit. The Supreme Court, however, held that, although the form of the combination did not, in this instance, necessarily eliminate competition, this result was, nevertheless, the evident purpose back of the corporation and would be its ultimate effect; and therefore the Court ordered the corporation's dissolution.[3]

[1] *U. S. Compiled Statutes* (1918), pp. 1423-1435.

[2] G. F. Edmunds, "The Interstate Trust and Commerce Act of 1890," *No. Amer. Rev.*, CXCIV, 801-817 (Dec., 1917); F. E. Leupp, "The Father of the Anti-Trust Law," *Outlook*, XCIX, 271-276 (Sept. 30, 1911).

[3] J. W. Garner, "The Northern Securities Case," *Annals Amer. Acad. Polit. and Soc. Sci.*, XXIV, 123-147 (July, 1904). Before this, the Supreme Court had held that the anti-trust law did not prohibit combinations of manufacturers, in United States *v.* E. C. Knight Co., 156 U. S., 1 (1894); but

During the next ten years the anti-trust law was enforced with far more energy than before.[1] Success in the Northern Securities case lent fresh zest. Besides there was the impetus which came from a new investigative agency, the bureau of corporations, created in the Department of Commerce and Labor in 1903. For eleven years this bureau was actively engaged in investigating the interstate activities of large corporations which were outside the jurisdiction of the Interstate Commerce Commission. By giving ample publicity to the organization, resources, and peculiar business methods of these establishments it was hoped that an effective check might be imposed upon the growth of monopolies and trusts. The evidence which the bureau obtained as the result of its inquisitorial labors was made the basis of a number of important and successful prosecutions by the Department of Justice before the bureau went out of existence in 1914.[2] In deciding some of these cases the Supreme Court found it necessary, notwithstanding the unqualified language of the anti-trust law, to distinguish between combinations which, in the Court's opinion, effected only a "reasonable," and those which amounted to an "unreasonable," restraint of interstate or foreign trade. In the cases against the American Tobacco Company and the Standard Oil Company, in 1911, for example, the Court applied this "rule of reason" and in effect read into the law declaring illegal "every" combination, etc., in restraint of trade, the word "unreasonable," after the word "every." The effect was practically to reverse or overrule earlier decisions in which the Court had held that *all* such combinations in restraint of trade came within the inhibition of the statute.[3]

Bureau of corporations

The "rule of reason"

The decisions in the two cases just mentioned brought clearly before the public the fact that if the anti-trust law applied only to "unreasonable" combinations and contracts, some means ought to be provided so that well-intentioned combinations might know definitely whether they would be regarded by the government as "reasonable," and therefore lawful, without first being subjected

Need for farther legislation

that railway commissions were prohibited by it, in United States *v.* Trans-Missouri Freight Association, 166 U. S., 290 (1897), and United States *v.* Joint Traffic Association, 171 U. S., 505 (1898). See, however, Addyston Pipe and Steel Co. *v.* United States, 175 U. S., 211 (1899).

[1] G. W. Wickersham, "The Enforcement of the Anti-trust Law," *Century Magazine*, LXXXIII, 616-622 (Feb., 1912).

[2] McLaughlin and Hart, *Cyclopedia of American Government*, I, 474.

[3] H. R. Seager, "The Recent Trust Decisions," *Polit. Sci. Quar.*, XXVI, 581-614 (Dec., 1911).

CHAP. XXVIII

to a criminal prosecution to determine their legal status. For the satisfactory and expeditious decision of such questions the ordinary courts of justice are obviously ill-fitted; the large amount of investigative work involved could better be carried on, it was argued by an administrative commission, similar to the Interstate Commerce Commission. At the same time, an insistent demand sprang up for such clarification of the anti-trust law as would indicate specifically the kinds of contracts which the government would regard as unreasonable restraints upon trade. Furthermore, since the dissolution of the tobacco and oil trusts had been based largely upon their unfair competitive methods, a simultaneous demand arose for incorporating in the anti-trust law an enumeration of all competitive practices which the government deemed unreasonable or unfair, and therefore illegal, rendering the party employing them liable to prosecution.[1] As an alternative, it was proposed to leave the determination of what constituted fair and unfair practices in specific cases, as well as what constituted reasonable and unreasonable restraints upon trade, to an administrative commission clothed with quasi-judicial powers and working along lines similar to those followed by the Interstate Commerce Commission in determining the justness and reasonableness of railway rates.

Federal Trade Commission

The result was the enactment, in 1914, of the Clayton Anti-Trust Law and of the law creating the Federal Trade Commission [2] and transferring to it the personnel, powers, and authority of the bureau of corporations, which thereupon ceased to exist. This new commission, like its prototype, the Interstate Commerce Commission, is outside, and quite independent of, any executive department. It consists of five members appointed by the president and Senate for seven-year terms. Upon it has been imposed the highly important duty of supervising and regulating all corporations, partnerships, or persons engaged in interstate commerce, except banks and the corporations and persons coming within the jurisdiction of the Interstate Commerce Commission.[3] As has been indicated, the main purpose of Congress in creating the new

Work of the Commission

[1] W. S. Stevens, "Unfair Competition: a Study of Certain Practices and their Relations to the Trust Problem in the United States," *Polit. Sci. Quar.*, XXIX, 282-306 (June, 1914).

[2] *U. S. Compiled Statutes* (1918), pp. 1429-1435.

[3] For a convenient summary of the powers and duties of the Federal Trade Commission, see *Congressional Directory*, 67th Cong., 2nd Sess. (Dec., 1921), 365-367. See also J. A. Fayne, "The Federal Trade Commission: the Develop-

administrative body was to provide an agency for dealing with trusts and unfair competitive practices generally which should be fair to the innocent and law-abiding, and at the same time more effective in its dealings with offenders than were wholesale or indiscriminate criminal prosecutions in the courts, followed by judicial decrees of dissolution. The anti-trust law was not repealed or weakened in any essential point; its enforcement was not to be abated in the least where combinations were found to exist which, in the judgment of the Commission, were unreasonable or which were based upon "unfair competitive methods." All cases of this sort were to be reported to the Department of Justice for prosecution as formerly.

To the Federal Trade Commission was also assigned the very important work of conducting investigations in the first instance, and of passing upon the reasonableness and fairness of contracts, combinations, and methods which, although restraining trade to some extent, are nevertheless in the great majority of instances neither unreasonable nor linked with unfair methods. For such purposes the Commission has been given broad inquisitorial powers over the corporations and other parties subject to its supervision and control. If, upon investigation, it finds an unreasonable combination or contract, or a party guilty of unfair competitive methods, the offenders are summoned before it, and proceedings assume a quasi-judicial character, as before the Interstate Commerce Commission. A formal hearing upon the charges takes place, after which an order is issued embodying the conditions to be fulfilled if the offender wishes to come under the protection of the laws and escape prosecution before the courts. Appeals may be taken to the circuit court of appeals, and ultimately to the Supreme Court; but an order of the Commission, when accepted by the parties, or when sustained after appeal to the courts, has full force of law.

Clayton Anti-Trust Act (1914)

The Congress which created the Federal Trade Commission also passed, at the same session, the Clayton Anti-Trust Law to supplement and reinforce both the Sherman law of 1890 and the Federal Trade Commission act.[1] The measure sought chiefly (1) to define more clearly and forbid certain abuses, discriminations, and restraints of trade, and to empower the Federal Trade Commission

ment of the Law which Led to Its Establishment," *Amer. Polit. Sci. Rev.*, IX, 57-67 (Feb., 1915); R. C. Butler, *The Federal Trade Commission and the Regulation of Business* (Chicago, 1915).

[1] H. R. Seager, "The New Anti-Trust Acts," *Polit. Sci. Quar.*, XXX, 448-462 (Sept., 1915).

CHAP. XXVIII

to suppress them; (2) to put the injured party in such cases, and in others arising under the original anti-trust law, in a stronger position by making it easier for him successfully to prosecute his suit; and (3) to undo the effect of decisions of the Supreme Court in certain recent anti-trust cases, notably the Danbury Hatters' case,[1] in which the Court had declared that boycotts instituted by labor organizations were combinations in restraint of trade and thus came within the inhibitions of the Sherman Anti-Trust Act. To meet this last situation, the Clayton act declared that nothing in the anti-trust laws "shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . or to forbid or restrain the individual members of such organizations from carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."[2]

The Webb Act (1918)

Before the effectiveness of these new methods of dealing with trusts and with combinations guilty of unfair practices could be given an extended trial, the World War came on, giving rise to conditions which, since its termination, have seemed to justify Congress in relaxing at certain points the severities of the anti-trust laws. Under the Webb Exporter Combination Law[3] passed in 1918, associations organized for the sole purpose of engaging in the export trade, together with their acts and agreements, are not to be deemed illegal under existing anti-trust laws, provided such associations and their agreements are not in restraint of trade in the United States or of the export trade of any domestic competitor of such an association.[4]

Relation of state and national control

In conclusion, it should again be emphasized that neither the Interstate Commerce Commission nor the Federal Trade Commission has any authority over commercial transactions which take place wholly within a single state. For such domestic commerce each state provides its own regulations, and for their enforcement practically every state has established some administrative board or commission, variously called a railway commission, public utilities commission, or commerce commission. Of a vast number of commercial transactions it is easy to say that they are wholly

[1] Loewe *v.* Lawlor, 208 U. S., 274 (1908). See also Bucks Stove and Range Co. *v.* Gompers, 221 U. S., 418 (1911).

[2] *U. S. Compiled Statutes* (1918), p. 1426, § 8835.

[3] *Ibid.*, p. 1435.

[4] *Ibid.*, p. 1435.

subject to state control, and of others it is equally easy to say that they are clearly of an interstate nature, which removes them wholly from state control. If all could be so simply classified few, if any, grounds of friction would be likely to arise between the state and national authorities over matters of commercial regulation. Much difficulty of this sort, however, has arisen, because many transactions unfortunately cannot be made to fit into either of two such mutually exclusive categories on account of the impossibility of drawing a clear line between their intrastate and interstate aspects. Inevitably, therefore, many state commercial regulations which have not been intended to interfere with interstate commerce as such have, nevertheless, indirectly affected this commerce in varying degrees, and for that reason have been challenged in the federal courts as invasions of a field reserved exclusively for congressional regulation.[1] As a result of decisions of the Supreme Court in a large number of such cases, it may now be said that state legislation which affects interstate commerce, even indirectly, will be regarded by the Court as null and void unless it clearly falls within one or another of three narrowly restricted classes.[2]

Valid state laws affecting interstate commerce

The first class includes cases in which state regulation can be justified as having for its main object the public convenience of the state's citizens; as, for example, laws which, without discriminating against interstate traffic, prohibit Sunday freight trains, or require passenger trains to stop at county seats and other populous places. The second class comprises a vast number of state laws enacted under the police power for the protection of public health, morals, and safety; for example, laws requiring locomotive engineers to be examined and licensed by state authorities, regulating the heating of passenger cars, establishing quarantines against diseases, and requiring that guards be stationed at crossings and bridges. In the third class are found state commercial regulations which are primarily local in their application, although they also affect interstate commerce incidentally; for example, laws regulating pilotage [3] and the use of wharves, piers, and docks; laws providing for the improvement of navigable channels, for the construction of dams and bridges across navigable streams,[4]

[1] J. P. Hall, *Constitutional Law*, 289-301.
[2] W. W. Willoughby, *Constitutional Law of the United States*, II, Chap. XLII.
[3] Cooley *v.* Wardens of the Port, 12 Howard, 299 (1851).
[4] Escanaba Co. *v.* Chicago, 107 U. S., 678 (1882).

and for the establishment of ferries; and laws authorizing the fixing of maximum charges for storing grain in warehouses and elevators.[1] Only in the enactment of regulations which fall within this third class may the states be said to have concurrent jurisdiction with Congress over *any* phase of interstate commerce. Even such local state regulations may remain in force only so long as Congress fails to legislate upon the matters with which they deal; and they may be modified at any time, or superseded altogether, by congressional action. Moreover, it is not always certain that such local regulations will be sustained by the courts, even in the absence of conflicting national laws; for the Supreme Court has more than once held that the absence of national legislation upon commercial matters covered by local regulations indicates an intention on the part of Congress that these particular phases of commerce, so far as they have an interstate bearing, shall remain open and unrestricted.

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CHAPTER XXIX

MISCELLANEOUS POWERS OF CONGRESS—WAR POWERS

Powers remaining to be considered

In preceding chapters we have considered the two most important powers which the constitution bestows on Congress, *i.e.*, raising and spending money and regulating commerce, together with many express and implied powers subsidiary thereto. At various earlier points we have taken note also of the functions of Congress in amending the constitution,[1] admitting new states,[2] regulating naturalization,[3] electing the president and vice-president,[4] and impeaching civil officers,[5] in addition to enacting general legislation and exercising a broad control over national administration.[6] In the succeeding chapter, devoted to the government of the territories, the important power to "dispose and make all needful rules and regulations respecting the territory or other property belonging to the United States" will be taken up. There remain, however, several powers of considerable intrinsic importance which may appropriately be commented on, however briefly, at this point. Viewed broadly, they fall into two main groups, according as they link up with the power to regulate commerce and business, as described in the preceding chapter, or relate to the exercise of military and naval authority.

Ancillary commercial powers

Four powers clearly belong to the first group: (1) the power to establish uniform laws on the subject of bankruptcy,[7] (2) the power to fix the standard of weights and measures,[8] (3) the power to promote the progress of science and the useful arts by granting patents and copyrights,[9] and (4) the power to establish post-offices and post-roads.[10]

1. Legislation on bankruptcy

Bankruptcy is one of the several subjects on which the national and state governments have concurrent legislative power. For a long time it was left largely or entirely to state control.[11]

[1] See p. 210. [2] See p. 164. [3] See p. 186.
[4] See p. 248. [5] See p. 392. [6] See p. 396.
[7] Art I, § 8, cl. 4. [8] Art. I, § 8, cl. 5. [9] Art. I, § 8, cl. 8.
[10] Art. I, § i, cl. 7.
[11] Before the enactment of the present law, national bankruptcy laws were in force only in 1801-03, 1841-43, and 1867-78.

But in 1898 Congress passed an elaborate bankruptcy act,[1] with the result that most of the former state laws on the subject are now either repealed or suspended. It is still permissible for a state to legislate on the subject. But in all cases of conflict the national law, of course, takes precedence; and this law is so comprehensive as to leave slight occasion for concurrent state action. Two classes of bankrupts are provided for in the act of 1898: (a) persons or corporations who voluntarily institute bankruptcy proceedings in order to obtain a distribution of their assets among their creditors and a legal discharge from their obligations; and (b) persons or corporations who are forced into bankruptcy proceedings by the action of their creditors. Any person, and any corporation except a bank, a railroad, an insurance company, or a municipal corporation, may institute voluntary bankruptcy proceedings. Involuntary proceedings may be commenced against any person or corporation, with the exceptions just noted and the farther exception of farmers and wage-earners.

Bankruptcy procedure

Proceedings in bankruptcy cases come under the jurisdiction of the federal district court of the district in which the bankrupt resides. Most of the details in a case are attended to by a referee in bankruptcy, who is appointed by the judge of the district court, and who makes detailed reports to the court from time to time in accordance with the law. After a bankrupt's assets have been inventoried and equitably distributed among his creditors, the judge enters a decree discharging him from all farther legal liability for debts incurred prior to the commencement of the bankruptcy proceedings. The Supreme Court has made it very clear, however, that the primary object of the bankruptcy law is not the discharge of the bankrupt person or corporation from farther legal liability, but the just distribution of the bankrupt's property among his creditors.

2. Weights and measures

The standards of weights and measures which Congress has established by law are those of the metric system, the use of which is optional, and the pound, yard, gallon, bushel, and their derivatives.[2] The fundamental standards of these various units, by which all other standards throughout the United States are tested and corrected, are deposited in the bureau of standards,

[1] *U. S. Compiled Statutes* (1918), pp. 1548-1562; S. W. Dunscomb, Jr., "The Federal Bankruptcy Law," *Polit. Sci. Quar.*, XIII, 606-616 (Dec., 1898).

[2] *U. S. Compiled Statutes* (1918), pp. 1447-1451.

CHAP. XXIX

established in 1901 and now located in the Department of Commerce; and they are made available to the public through copies or duplicates furnished by the national government to the several state governments. Beyond this, the regulation of commercial and trade standards has been left almost wholly to state, county, and municipal laws and ordinances. The testing and research work carried on by the bureau of standards is of high value, not only to commercial, manufacturing, and engineering interests, but to the universities and other scientific institutions of the country as well.

3. Copyrights and patents

Our present copyright and patent laws and regulations have come into existence under the constitutional grant of authority to Congress "to promote the progress of science and the useful arts" by securing to authors and inventors, for limited periods, "the exclusive right to their respective writings and discoveries."[1] The administration of the copyright laws falls within the jurisdiction of the division of copyrights of the Library of Congress, and is under the immediate supervision of the register of copyrights.[2] The patent laws and regulations are administered under the supervision of the commissioner of patents in the Department of the Interior.[3]

What may be copyrighted

Copyright has been defined as "the exclusive right secured to an author by statute to reproduce and publish his work." This exclusive right is granted for a period of twenty-eight years, with the right of renewal for an equal period. Books printed in the English language must be typeset in the United States in order to receive the protection of our copyright laws.[4] Copyright includes the exclusive right to translate, dramatize, and represent the work; and in the case of a musical production, the right to perform it publicly for profit, and also to exact a fixed royalty for its reproduction by mechanical instruments. Copyright thus extends not only to books but also to works of art, charts, maps, musical compositions, cartoons, and photographs. It is granted to every person who applies in conformity with the law; the division of copyright makes no effort to ascertain whether there is any infringement of a previously copyrighted publication or pro-

[1] A similarly worded provision appeared as early as 1683 in William Penn's frame of government for Pennsylvania.

[2] *U. S. Compiled Statutes* (1918), pp. 1532-1547.

[3] *Ibid.*, pp. 1525-1532.

[4] G. H. Thring, "The United States Copyright Law and International Relations," *No. Am. Rev.*, CLXXXI, 69-89 (July, 1905).

duction. Where such infringement occurs, the injured party is obliged to seek redress in a suit for damages, or by injunction proceedings, in the federal courts.

Patents

The grant of a patent, on the other hand, is of itself, prima facie evidence to the patentee that his invention or discovery does not infringe some previously patented invention or discovery; for before letters patent are granted to an applicant the officials of the patent office conduct careful investigations for the purpose of ascertaining whether that which purports to be a new invention or discovery is in reality original and, therefore, patentable, or is an infringement upon some prior invention. Patents may be granted to any person who has invented or discovered "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country" within a period of two years prior to the filing of the application for the patent.[1] Redress in cases of patent infringement must be sought first in bearings before officials connected with the patent office, from whose decisions appeals may be taken to the commissioner of patents and ultimately to the circuit court of appeals, where the case is finally disposed of. The term for which a patent runs is seventeen years, and in some cases renewal is possible for a like period.

Scope of patent rights and copyrights

The rights secured by authors and inventors under the copyright and patent laws are clearly monopolistic: "the exclusive right to their respective writings and discoveries" is what the constitution expressly guarantees. But what is the scope of these "exclusive rights"? How far in the exercise of them may the owner of a copyright or patent go in imposing restrictive conditions upon the sale or use of his writing or invention? When, if at all, will the exercise of these exclusive rights bring him into collision with the anti-trust laws prohibiting contracts in restraint of trade? These and other similar or related questions have been before the Supreme Court for decision several times in the past ten years, and they have received somewhat inconsistent answers.[2]

[1] *U. S. Compiled Statutes* (1918), p. 1526, § 9430. In 1920-21, 107,636 applications for patents were filed in the patent office, an increase of forty-three per cent in two years. For the way in which the efficiency of this important office has been impaired in recent years by lack of adequate appropriations, see *Annual Report of the Commissioner of Patents* (1921).

[2] J. T. Young, *The New American Government and Its Work*, 154-160.

In the rotary mimeograph case, for example, decided in 1912,[1] the Court held that patent rights include the legal right to sell the patented article under any conditions or terms which the owner of the patent may choose to impose, and that they even extend so far as to permit him to prescribe that the article shall be used only with certain materials of his own manufacture or under his control, although unpatented themselves. In this case the owner of the mimeograph patent had required purchasers of his mimeograph machine to agree to use with it only stencil-paper, ink, and other unpatented supplies made by the owner of the patent. This decision of the Court was reached by a four to three vote of the justices, there being two vacancies at the time. It roused wide criticism, for it seemed to open up the possibility of subverting, under cover of patent rights, much that had been accomplished under the anti-trust laws in checking contracts in restraint of trade.

Price-fixing under patents and copyrights

On the other hand, when, in the following year (1913), similar questions came before a full bench of justices, involving the validity of price-fixing agreements for the sale of a patented medicine and of copyrighted books, different conclusions were reached. In the first of these cases[2] the Court held that when a patentee has sold a patented article he has placed it beyond the limits of the "exclusive rights" secured by the patent, and that contracts to maintain a standard price therefor are in restraint of trade and accordingly prohibited by the anti-trust law. The same principle was applied in the case involving an attempt by an association of publishers who owned the copyright of certain books to uphold and enforce, as a copyright privilege, an agreement to refuse to supply their copyrighted books to retailers who sold them for less than the standard price fixed by the publishers.[3] The Court held that ownership of a copyright gives publishers no control over the books after they have sold them to a retailer; that the latter, having made them his property, can resell them at any price; and that the anti-trust laws prohibit agreements among copyright owners to refuse to sell to persons who re-sell at less than a Standard price. In 1914 Congress included in the Clayton Anti-Trust Act a clause which counteracted the possible disastrous effects of the decision in the mimeograph case by forbidding the sale or lease

[1] Henry *v.* A. B. Dick Company, 224 U. S., 1.

[2] Bauer and Co. *v.* O'Donnell, 229 U. S., 1 (usually called the Sanatogen case).

[3] Strauss and Strauss *v.* American Publishers Assoc. *et al.*, 231 U. S., 222.

of patented or unpatented articles, or fixing prices therefor, "on the condition or understanding that the purchaser or lessee shall not use" the goods of competitors, "when the effect of such an agreement or lease may be to lessen competition or create a monopoly;" and in a later case (1917) the Supreme Court took exactly the opposite position from that taken in the mimeograph decision.[1]

4. Postal power

Even more clearly related to the power of Congress over commerce than are the express powers to pass uniform bankruptcy laws, establish standards of weights and measures, and grant copyrights and patents is the power to establish post-offices and post-roads. So intimate, in fact, is the connection between commerce and the postal service that had the express grant just mentioned been omitted from the constitution, Congress might have established a postal system under power implied in the commerce clause. It is safe to say that no activity of the national government touches more people, in a greater variety of ways, and more continuously than does the postal system. The head of the Post-office Department, the Postmaster-General, is the responsible head of probably the biggest business enterprise in which any government has ever been directly concerned. From being merely a device for the transportation of letters and a few newspapers, the service has expanded into the highly complex system which today employs approximately three hundred thousand persons in performing its four distinct functions of (1) collecting, transporting, and delivering mailable matter, (2) operating a system of money orders for the transfer of money, (3) maintaining a banking system, and (4) carrying on an express business.[2]

Activities of the postal service

The primary function of the postal system is, of course, to collect, transport, and distribute, letters, cards, newspapers, periodicals, and other mailable matter. This is an activity in which the several states once had a right to engage. Since the adoption of the national constitution, however, it has belonged exclusively to the federal government. Furthermore, all the early doubts as to the constitutional authority of Congress to create an elaborate postal *system*, instead of merely designating which of existing buildings and routes were to be used as post-offices and post-roads, have long since vanished. Under its authority both to establish post-offices and post-roads and to regulate interstate commerce, Con-

[1] Motion Pictures Patent Co. *v.* Universal Film Co., 243 U. S., 502.

[2] The administration of the postal service is briefly described in an earlier chapter. See pp. 323-324.

gress has passed laws excluding from the mails lottery tickets and advertisements, the letters, papers, advertisements, or other documents of persons or corporations practising fraud and deception, and writings of many kinds which tend to encourage crime or immorality.[1] Matter which has thus been excluded from the mails may, however, be distributed in some other way, by private agencies, unless, as in the case of lottery tickets, its transportation in interstate commerce has been prohibited by Congress.

Money-orders

To these primary functions of the postal service was added in 1864 the system of postal money-orders for the transfer of money between parties living in different places. But the most important additions to the services rendered by the postal system have taken place much more recently. In 1910 Congress authorized the Post-office Department to engage in the savings-bank business by designating certain post-offices at which savings might be deposited at a low rate of interest. This was the beginning of the present extensive postal-savings system. In support of the innovation it was urged that there were large sections of the country which were inadequately provided with savings banks; that extensive use of postal savings banks would be made by the foreign-born, who had been accustomed to such institutions in Europe and were distrustful of our ordinary banks; and that the postal savings banks could be utilized to provide a market for United States bonds.[2] From a very modest beginning in 1911, the system has been extended, within a decade, to practically all parts of the country; and the number of depositors and the magnitude of their deposits show that it has abundantly justified itself: in 1921 more than 6,300 post-offices were authorized to accept deposits, and there were almost a half million depositors, with deposits aggregating $152,389,903.[3]

Postal savings banks

Parcel post

After long opposition on the part of the great express companies and small retailers, Congress, in 1912, passed a law which authorized the Post-office Department to engage in the express business; and this new service was inaugurated in 1913 as the parcel-post system. In 1919 over two and a quarter billion parcels were handled by the post-offices of the country. In addition to the domestic parcel post service, the United States has interna-

[1] *U. S. Compiled Statutes* (1918), pp. 1702-1709.

[2] G. von L. Meyer, "Postal-Savings Banks," *No. Amer. Rev.*, CLXXXVIII, 248-253 (Aug., 1908), and "The Need of Postal-Savings Banks," *Rev. of Revs.*, XXXIX, 47-48 (Jan., 1909).

[3] About seventy-five per cent of the depositors are of foreign descent. See *Annual Report of the Postmaster-General* (1921), 84-87, 131-132, 141-146.

tional parcel post agreements with all the principal European nations, and with Brazil, China, Japan, and numerous other widely scattered countries.[1]

Air mail service

The most noteworthy of recent developments in connection with the postal service has been the creation, in 1918, of the first practical commercial airplane mail service to be established in any country. The first regular route was between Washington and New York City. A larger appropriation, available in 1920, made possible the establishment of practically daily airplane mail service between Chicago and St. Louis, between New York City and Omaha via Chicago, and a later extension of this route to San Francisco. Similar service was also established between Chicago and Minneapolis, but, owing to lack of funds, had to be abandoned early in the summer of 1921, as was also true of the New York-Washington service.[2] The practicability of airplane carriage of at least relatively small quantities of matter requiring speedy transportation has been fully demonstrated, and it is fair to assume that the present limited airplane service will be gradually extended.

War powers of the national government

The defect of the government under the Articles of Confederation which came nearest to proving fatal was the inability to mobilize the full fighting strength and material resources of the country in prosecuting the final stages of the Revolutionary War. On several occasions, too, Congress found itself without authority, or the courage to assume authority, to use the national military forces to suppress internal disorders and insurrections.[3] This experience serves to explain why the preamble of our present constitution states that two of the principal objects sought in the adoption of the new instrument in 1787 were to "insure domestic tranquility," and to "provide for the common defense." To secure these ends, very important and far-reaching powers were conferred, not only upon the president in his capacity of commander-in-chief of the army and navy, but also upon Congress as the law-making, taxing, and appropriating organ of the national government.

Scope of these powers

Recent events connected with our participation in the World War have shown that there is practically no power over the lives and property of citizens, deemed necessary for the successful conduct of war, which has not been granted by the constitution,

[1] *Annual Report of the Postmaster-General* (1921), 81.
[2] *Ibid.*, 45-48.
[3] J. Fiske, *The Critical Period*, 147-153, 177-186.

CHAP. XXIX

either in express terms or by implication. "The farmer's wheat, the housewife's sugar, coal at the mines, labor in the factories, ships at the wharves and on the high seas, trade with friendly countries, the vast national railway system, the banks and stores, private riches, lands and houses, all were mobilized and laid under whatever obligations the requirements of waging war made imperative. Never before were labor and capital, land and natural resources, so completely subjected to governmental authority in a common enterprise." In brief, the powers of Congress with respect to the national defense are practically unlimited, except by the provision that the president shall be commander-in-chief and that appropriations for the army shall not be made for a longer period than two years.

1. Declaration of war

The constitutional provisions which made possible this remarkable and unprecedented exercise of the "war powers" of Congress can be indicated briefly. First, to Congress is given the right to "declare war."[1] In practice, this grant has been of less importance than was expected, because the president, by his conduct of foreign relations, may create a situation from which the nation cannot withdraw with honor or without serious loss of prestige; in such cases Congress has little or no choice but to declare war.[2] Formal declarations of war, in the sense of announcing that hostilities will be begun, have been almost wholly lacking in our history. In most instances, the declaration has amounted to nothing more than the formal announcement that a state of war already existed. Such a declaration has its value from a strictly legal point of view, in that it fixes the exact date from which the rights and liabilities incident to a state of war are to be reckoned. Whether this grant of authority to declare war carries with it, as a corollary, the right of Congress to declare the end of a state of war and the resumption of peaceful relations, was warmly and exhaustively debated in the sessions of Congress held in 1920 and 1921. Finally, more than two years after the signing of the armistice which marked the actual cessation of hostilities, a joint resolution was passed in July, 1921, declaring the war with the central European powers to be at an end.[3]

[1] Art. I, § 8, cl. 11. This clause also grants authority to issue letters of marque and reprisal, which, however, has been of no practical importance since the disappearance of privateering.

[2] See p. 269.

[3] For full consideration of this matter see J. M. Mathews, *Conduct of American Foreign Relations,* 328-336; E. S. Corwin, "The Power of Congress to Declare Peace," *Mich. Law Rev.,* XVIII, 669-675 (May, 1920).

2. Provision and maintenance of military and naval establishments

Under the power to "raise and support armies" and to "provide and maintain a navy,"[1] supplemented by its authority over commerce and the power to tax, borrow, and appropriate, and by its direct and indirect control over the administrative agencies charged with the detailed conduct of war, Congress derives its power to take whatever steps may be necessary to safeguard the nation in time of peace and to insure the vigorous and effective carrying on of hostilities in time of war. Of the necessity and appropriateness of the means thus employed, Congress is the sole judge, being responsible for the proper exercise of these great powers, not to the courts, but to the electorate. It is even debatable how far the guarantees of personal liberty (including freedom of speech and the press) found in the first ten amendments impose restraints upon the action of Congress in exercising its otherwise practically unlimited war powers.

Emergency laws, 1917-18

During the World War the war powers of Congress were successfully invoked to justify the enactment of two important classes of emergency laws. One class of measures looked to the mobilization of all the human and natural resources of the country; the other class had for its object the prevention of interference with the conduct of the war. In the first class belong the selective service, or conscription, laws of 1917 and 1918; a number of measures designed to protect the health and morals of the enlisted men; the civil relief acts, designed to prevent prejudice to the civil rights of persons in military service; the war-risks insurance act for the welfare of families of soldiers and sailors who died or were wounded in the service; laws stimulating the production of ships, munitions, food, and fuel; laws authorizing the president to take over and operate the great railway systems of the country; statutes creating a long list of boards and commissions charged with the supervision of essential industries and activities, or with the administration of some of the enactments just mentioned; and laws providing for the reorganization of the administrative departments of the government so as to increase their efficiency. In the second group of measures, which had for their purpose the prevention of interference with the conduct of the war, are found, notably, the espionage act of June, 1917, and its supplement, the sedition act of May, 1918. These laws imposed restrictions upon freedom of speech and the press which, in the opinion of many able lawyers, were unconstitutional invasions of

[1] Art. I, § 8, cls. 11-12.

the sphere of liberty supposed to be reserved and safeguarded by the national bill of rights.[1] Other measures coming within this general class were the trading-with-the-enemy act of 1917 and the war-materials-destruction, or sabotage, act of April, 1918.

3. Military and naval regulations

Congress has been given authority to prescribe "rules for the government and regulation of the land and naval forces[2] and "rules concerning captures on land and water."[3] The rules which Congress has enacted for the army are called the "Articles of War,"[4] and those for the navy, "Articles for the Government of the Navy;"[5] collectively the two are known as the "Military Laws of the United States." They comprise the rules by which the respective powers and duties of officers and men in the military and naval service are determined and exercised, including the regulations governing the trial and punishment of infractions of military discipline and procedure of courts-martial in both the army and the navy. Courts of inquiry have also been provided for, in both the army and navy, to investigate and report facts in cases referred to them; but, unless they have been specially required to do so, they are not permitted to express opinions as to the merits of the cases, or to make recommendations.[6]

4. Suspension of habeas corpus

Because of its inclusion in the article of the constitution which sets forth the organization and powers of Congress, lawyers have argued that Congress alone has the right to suspend the privilege of the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it."[7] In the case of John Merryman,[8] Chief Justice Taney held that the suspension of the privilege of the writ was a prerogative of Congress rather than of the executive, and at different times during the Civil War Congress passed acts suspending the writ. President Lincoln, on the other hand, assumed that the right to suspend belonged to the executive, and acted in accordance with that view at the opening of the war and before Congress was convened in special session. In a message to Congress he vigorously defended the legality of his action; and Congress, in order to remove any question of legality,

[1] Z. Chafee, *Freedom of Speech* (New York, 1920).
[2] Art. I, § 8, cl. 14. [3] Art. I, § 8, cl. 11.
[4] *U. S. Compiled Statutes* (1918), pp. 315-328.
[5] *Ibid.*, pp. 388-396.
[6] *Ibid.*, pp. 324, 395; see also, E. B. Creecy, "Courts-Martial," *Amer. Jour. Crim. Law and Criminol.*, X, 202-207 (Aug., 1919).
[7] Art. I, § 9, cl. 12.
[8] W. W. Willoughby, *Constitutional Law of the United States*, II, 1255-1258.

passed various acts of indemnity to meet the situation which had thus arisen.[1]

5. Regulation of the national guard

Congress may provide for as large a professional or standing army as it desires. Our traditions, however, in common with those of English-speaking peoples everywhere, are opposed to the maintenance of large standing armies in time of peace, and hence much attention has been given to the organization and training of volunteer militia, commonly known as the national guard. The powers of Congress with respect to the militia are both explicit and extensive. Congress is expressly authorized to "provide for organizing, arming, and disciplining the militia," and it may provide for calling out the militia for three distinct purposes, namely, to execute the national laws, to suppress insurrections, and to repel invasions. Congress is also empowered to provide for governing such part of the militia as may be "employed in the service of the United States," although the appointment of the militia officers and the authority to train the militia in accordance with congressional regulations are expressly reserved to the states.[2] In exercising these broad powers Congress has enacted numerous laws with a view to increasing the effectiveness of the national guard and coördinating its organization, training, and equipment more and more closely with that of the regular army.[3]

Calling out the militia

The militia, both organized and unorganized, is always at the disposal of the national government in case of actual or threatened invasion, war with a foreign nation, or rebellion against the authority of the United States. If the regular federal military forces are inadequate to deal with a given emergency, the president may call out such number of the militia of any state or territory as he deems necessary. Of the necessity of calling upon the militia in such crises, he is the sole judge; and therefore it becomes the duty of every member of the militia thus called out to respond to the president's summons.[4] Whenever employed in the national service, the militia comes under the same complete federal control as the regular national forces, and is, of course, subject to the rules and articles of war mentioned above.

[1] See p. 270. Cf. J. D. Richardson, *Messages and Papers of the Presidents*, VI, 25; S. G. Fisher, "Suspension of Habeas Corpus During the War of the Rebellion," *Polit. Sci. Quar.*, III, 454-488 (Sept., 1888); G. C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress* (Madison, 1907).

[2] Art. I, § 8, cls. 15-16.

[3] *U. S. Compiled Statutes* (1918), pp. 396-417.

[4] Martin *v.* Mott, 12 Wheaton, 19 (1827).

CHAP. XXIX

6. Establishment of military reservations

Lastly, Congress is authorized to purchase sites within the states, with the consent of the legislatures thereof, for the erection of forts, magazines, arsenals, dockyards and other needful buildings; and over such "military reservations" it may exercise "exclusive legislation."[1]

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[1] Art. I, § 8, cl. 17.

CHAPTER XXX

THE GOVERNMENT OF THE TERRITORIES

Origin of the national domain

The clause which authorizes Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"[1] was placed in the constitution primarily in order to enable the new government to continue to exercise an important power which had been assumed by the national government under the Articles of Confederation. Without any express grant of authority, the old Congress had provided for the government of the region north and west of the Ohio river, commonly called the Northwest Territory, by enacting in 1787 a fundamental law known as the Northwest Ordinance—probably the most important single measure adopted by Congress during the entire period of the Confederation. The region covered by this ordinance had come into the possession of the United States as a result, not only of the victory in the Revolutionary war, but of a series of cessions made by states which originally claimed various parts of the territory. Seven states, in all, had such claims, *i.e.*, Massachusetts, Connecticut, New York, Virginia, North Carolina, South Carolina, and Georgia. Out of these conflicting interests serious complications, imperiling the permanence of the new union, might easily have arisen; for no state was willing to concede the validity of any rival claims, and there was no common tribunal, such as now exists, from which a final adjudication could be sought. With the more or less open approval of the other small states whose boundaries were definitely fixed, and who accordingly had no individual claim to the western territory, Maryland, indeed, refused to ratify the Articles until the western claims were relinquished, thereby delaying by many months the taking effect of the new governmental system. Finally, New York and Connecticut, soon followed by Virginia, agreed to an arrangement, in which eventually all of the other claimant states joined, whereby the disputed territory was ceded to the United States, to be held and administered by the national gov-

[1] Art. IV, § 3, cl. 2.

ernment for the benefit of the entire country. Maryland thereupon ratified; the Articles went into effect; and the nation came into possession of its first public domain, for whose government the Northwest Ordinance was enacted in 1787 and reënacted, substantially unchanged, two years later by the first Congress under the new constitution.

Government under the Northwest Ordinance

The Northwest Ordinance provided that in the region north and west of the Ohio River there should be a governor, a secretary, and three judges, all appointed by Congress, or, as altered in 1789, by the president and Senate. These officers were empowered to adopt, promulgate, and enforce within the Territory such civil and criminal laws of the original states as they deemed best suited to territorial conditions, subject always to the veto of Congress and the right of that body to legislate for the Territory upon its own initiative. Under this arrangement the inhabitants were not given any voice in governing themselves. But it was intended to be only temporary. The Ordinance went on to provide that when the Territory's population should be found to include as many as five thousand free male inhabitants of voting age a legislature should be established whose lower house should consist of members elected, for a term of two years, by the qualified voters. The upper house, called the council, was to be composed of five persons appointed by Congress (after 1789, by the president) from a list of ten persons nominated by the territorial house of representatives and selected from residents of the Territory who owned five hundred acres of land. Their term was five years.

To the governor and these two houses belonged, when this second stage was arrived at, all the legislative power previously exercised by the five original territorial officers; and the concurrence of the two houses and the governor was necessary to the enactment of laws. Congress, however, retained, as before, the right to veto acts of the legislature and to legislate upon its own initiative. In that body, however, the people of the Territory were not wholly unrepresented, for the Ordinance authorized the two territorial houses in joint session to elect a delegate who should have a seat in Congress and the right to participate in debates, although without any vote. The Ordinance went even farther and included detailed provisions guaranteeing the fundamental civil and political rights of the inhabitants of the Territory, similar to the bills of rights in existing state constitutions.

The importance of the Northwest Ordinance lies not only in

the liberal provisions made for local self-government, for representation in Congress, and for the enjoyment of fundamental civil and political rights, but also in the fact that the scheme of government therein outlined became the precedent or model for practically every law afterwards enacted by Congress for the government of our continental possessions; indeed, many of the more essential provisions found in later territorial organic acts were taken over almost bodily from the earlier Ordinance.[1] Of equal, or even greater, importance, however, is the fact that the Ordinance made it perfectly clear that the people of the Territory were not to be kept in perpetual subjection to congressional authority, but that, on the contrary, the territorial government was simply to serve as a temporary arrangement until the growth of population should warrant the Territory's admission to the Union as a state or group of states, upon a footing of equality with the other states. In other words, the territorial status was to be regarded merely as preparation for full statehood. Accordingly, the Northwest Territory was divided in 1800 into the "Indiana Territory" and the "Territory Northwest of the River Ohio"; and two years later the greater part of the latter was admitted to the Union as the state of Ohio. Subsequently, from the Territory of Indiana were set off the Territories of Michigan, Illinois, and Wisconsin, each of which was later admitted to the Union. The Southwest Territory underwent a similar splitting up, followed by the admission to statehood of Kentucky, Tennessee, Alabama, and Mississippi.

Importance of the Northwest Ordinance

All of the territorial governments just mentioned were created in a region inherited by our present national government from the government of the Confederation, and of course it was this western expanse that the framers of the constitution had in mind when they expressly authorized Congress to make all needful rules and regulations for the government of territories. It is not equally clear that the framers had any intention of authorizing the acquisition by the national government of the other regions, even those which were contiguous, in which Congress afterwards set up territorial governments. Nevertheless, repeated decisions of the Supreme Court have settled beyond all question that the right of the national government to acquire territory, although not expressly

Power to acquire territory

[1] In 1790, for example, Congress authorized a government for the region south and west of the Ohio River, known as the Southwest Territory, which was in all respects similar to that provided for in the Northwest Ordinance. In territories organized after 1836 the appointed council forming the upper branch of the legislature was replaced by a popularly elected senate.

CHAP. XXX

granted, may be implied from the power to admit new states into the Union, from the power to make treaties, or from the power to carry on war and make peace.[1] Under one or another of these implied powers, Louisiana was acquired in 1803, Florida in 1819, Texas in 1845, Oregon in 1846, California in 1848, Alaska in 1867, Hawaii, Porto Rico, and the Philippines in 1898, and the Virgin Islands in 1917.

Power to govern territory

The moment the title of the United States to any territory becomes established, the power of Congress to legislate for the territory's government begins. During time of war, the president, in his capacity as commander-in-chief, governs, through the army and navy, any territory acquired by conquest; but with the establishment of peace his authority as commander-in-chief ceases, and whatever power he may thereafter exercise must be based upon authority specifically granted by the constitution or by act of Congress. At different times Congress has temporarily clothed the president with practically absolute power over a territory. But sooner or later it has established, in practically all regions acquired before the Civil War, governments similar to those created in the old Northwest and Southwest Territories; and ultimately all such territories have been admitted as states. The only departures from the rule were California and Texas, which were admitted as states without having passed through the territorial stage.

Extent of this power

The admission of these two states and the organization of territorial government in those portions of the national domain not covered by the Northwest and Southwest ordinances, furnished the occasion, prior to 1860, for many exciting sectional controversies over slavery. At no time, however, was the absolute power of Congress to determine the form of territorial governments challenged; and the principle became firmly established that such governments exist merely as the instrumentalities by which Congress exercises its authority over the territories, and may therefore assume any form that Congress deems suitable: they may or may not be republican in form; they may or may not observe the principle of separation of powers; they may or may not grant to the inhabitants the rights of self-government. The real sectional conflict finally centered in the question whether the inhabitants

[1] As a sovereign state, the United States also has, under international law, the power to acquire territory by discovery and occupation, or by the methods recognized as proper by international usage. This is the basis of the title of the United States to the Guano Islands, acquired in 1856. See *U. S. Compiled Statutes* (1918), §§ 3916-3924.

of a territory have the same personal and property rights under the constitution that citizens enjoy in the states. More specifically, could Congress prevent the owners of slaves from enjoying their personal and property rights in that species of property in the territories, when admittedly it could not interfere with those rights in the states? Did the prohibition of slavery in the territories amount to a deprivation of property without due process of law, in violation of the Fifth Amendment? The issue thus raised was decided by the Supreme Court in the Dred Scott case in favor of the pro-slavery contention that the provisions of the bill of rights limit congressional action not only when legislating for the inhabitants of the states but also when legislating for the people of the territories. So far as slavery was concerned, the Civil War and the Thirteenth Amendment reversed this decision; but forty years or more thereafter the Court upheld the same legal principle in deciding that the Sixth and Seventh Amendments prevent both Congress and a territorial legislature from changing the constitutional rule requiring trials by juries of twelve persons and unanimous verdicts.[1]

New problems following the Spanish-American War

With the exception of Alaska, all territories acquired by the United States before the Spanish-American War were contiguous and had been settled and developed by natives of this country and by European immigrants whose civilization and traditions were not fundamentally different from our own. Consequently, Congress felt little or no hesitation in extending to them a large measure of self-government and all of the civil rights secured by the national constitution. The Spanish-American War, however, brought under the control of the United States non-contiguous territory lying in the tropics and inhabited by relatively backward peoples of different race, almost totally inexperienced in self-government, and enjoying none of the civil and political rights which have long been the cherished heritage of citizens in our own country. Admittedly, the power to govern these new acquisitions resided in Congress; and at first glance it seemed that it would be necessary to extend to their inhabitants all the rights and privileges enumerated in the constitution, including freedom of speech and of the press, right to bear arms, and trial by jury. The embarrassing results which might follow this adherence to legislative and judicial precedents made it highly desirable, how-

[1] Springville City *v.* Thomas, 166 U. S., 707 (1897); Rassmussen *v.* U. S., 197 U. S., 516 (1905).

CHAP. XXX

ever, to draw some distinction between the legal status of these new possessions and that of the older territories on the continent; and in a series of decisions, beginning about 1900,[1] the Supreme Court found it possible to develop such a distinction, and thereby to release Congress from some of the restrictions under which it had previously dealt with territorial problems. The distinction which the Court evolved was that between territory "incorporated" in the United States and territory "not incorporated." In the former category were included Alaska, Oklahoma, New Mexico, and Arizona, none of which, at the time of these decisions, had been admitted to statehood. In legislating for the incorporated territories, said the Court, Congress was bound by all the limitations in the constitution which were not clearly inapplicable. Hawaii, Porto Rico, and the Philippines, on the other hand, were held to be "unincorporated" territories; they belonged to the United States rather than to any foreign power; they were appurtenant to, and dependencies of, the United States, but not a part thereof in the sense in which the incorporated territories were. Congress, therefore, in legislating with respect to them was not bound by all the limitations of the constitution applicable to the incorporated territories, but only by the "fundamental" parts of the constitution which automatically extend to all territories of the United States as soon as they cease to be foreign territory; the "formal" portions of the constitution, on the other hand, apply to unincorporated territories only when Congress expressly so directs.

The insular decisions: "incorporated" and "unincorporated" territories

Illustrations

The Court has not attempted to make an exhaustive enumeration of the fundamental and formal parts of the constitution, but has reserved the right to determine from time to time what parts are fundamental and what parts are formal. In cases already decided, it has held that Congress is not bound by the requirement that taxes shall be uniform throughout the United States, but may impose taxes upon articles coming from the island dependencies which are different from those collected upon similar articles coming from a foreign country. Similarly, the Court has held that the requirement of grand and trial juries for the prosecution of criminals does not bind Congress in providing for the government of unincorporated territories like Hawaii and the Philippines. Moreover, it has held that the mere act of annexation did not make the inhabitants of these islands citizens of the United States, but

[1] J. W. Burgess, "The Decisions in the Insular Cases," *Polit. Sci. Quar.*, XVI, 486-504 (Sept., 1901).

that American citizenship is to be derived from some express grant thereof by Congress. The result of all of these decisions has been to give Congress a fairly free hand in working out the new problems arising out of our possession of tropical dependencies inhabited by politically inexperienced peoples. As a matter of fact—as will appear from the following brief description of the government organization which Congress has seen fit to provide for Alaska and for our newer possessions—most of the rights guaranteed by the constitution have been generously extended to the people of the outlying dependencies.

The government of Alaska

Alaska is at present our only "incorporated" territory. Its inhabitants are citizens of the United States; and in the organic act of 1912[1] the constitution and all laws of the United States not locally inapplicable are expressly declared to be in effect there as elsewhere in the country. For seventeen years after the territory's acquisition in 1867, Congress took little notice of it, aside from extending over it the laws of the United States relating to customs, navigation, and commerce; the enforcement of these laws was left to the president, acting principally through the Treasury Department and the Department of Justice. The present government is based on an act of 1884 establishing the first civil government, on later amendments to this act, and especially on the organic act of 1912 which gave the region a fully organized territorial government of the traditional type. There is a governor, and a surveyor-general acting *ex officio* as territorial secretary; and in each of four judicial districts there is a district judge, a district attorney, and a marshal. All of these officers are appointed by the president and Senate for a four-year term, and are paid for their services out of the national treasury. The district court, now organized in four divisions, has the civil, criminal, equity, and admiralty jurisdiction of the district, and former circuit, courts of the United States.

Executive and judiciary

Legislature

In 1912 Congress authorized the establishment of a territorial legislature consisting of a senate and a house of representatives. The senate is composed of eight members, two elected from each of the four judicial districts; the house consists of sixteen members, four elected from each judicial district. The term of senators is four years; that of members of the house, two years. The first session of this legislature was held in 1913. The length of legislative sessions is limited to sixty days in any period of two years, although

[1] *U. S. Compiled Statutes* (1918), pp. 519-544.

CHAP. XXX

special sessions, not to last more than fifteen days, are also authorized. The power of the legislature extends to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States"; although a long list of limitations upon legislative action is included in the organic act. The governor may veto legislative measures, which are subject also to disallowance by Congress. A governor's veto can, however, be overcome by a two-thirds vote in each house. Since 1906 Alaska has been represented in Congress by an elected delegate, who, however, has no vote. The right to vote for territorial delegate and for members of the legislature has been granted to all male citizens of the United States, twenty-one years of age, who are bona-fide residents of Alaska, and who have been resident continuously during the entire year immediately preceding an election.

The government of Hawaii

Hawaii, Porto Rico, and the Philippine Islands are the most important of our unincorporated territories. The people of the republic of Hawaii had long been seeking inclusion in the United States when Congress, in 1898, voted by joint resolution to annex the islands. Two years later the organic act was passed which now forms the basis of the government of the territory of Hawaii.[1] By

Citizenship

this act all persons who were citizens of the Hawaiian republic on August 12, 1898, are declared to be citizens of the United States and of the territory of Hawaii; and all male citizens of the United states who resided in Hawaii on that date, or who subsequently have resided in the territory for one year, are declared to be citizens of the territory. The constitution of the United States and, with a few exceptions, all United States laws not locally inapplicable have the same force and effect in the territory as elsewhere in the United States.

Executive

The present government of Hawaii follows very closely the traditional arrangements of organized territorial governments. Executive authority is vested in two sets of officers, one appointed by the president and Senate, and the other appointed by the governor of the territory and the Hawaiian senate. In the former class are the governor and the secretary, both of whom are appointed for a four-year term. The officers appointed and removable by the governor and territorial senate are an attorney-general, a treasurer, a commissioner of public lands, a commissioner of agriculture and forestry, a superintendent of public works, a

[1] *U. S. Compiled Statutes* (1918), pp. 545-557.

superintendent of public instruction, an auditor and a deputy auditor, a surveyor, and a high sheriff. The term of all of these officials is four years.

Legislature

The legislature comprises a senate and a house of representatives, both elected by direct popular vote. The senate consists of fifteen members chosen for four years from senatorial districts which are entitled to two, three, four, or six senators, respectively. Each voter, however, is permitted to vote for only one candidate. The house of representatives has thirty members, elected every two years, from six representative districts, each of which is entitled to either four or six members. Voters are permitted to vote for the full quota from their district. Legislative sessions are held biennially, and are limited to sixty days, although the governor may extend a session thirty days. The power of the legislature extends to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States, locally applicable"; at the same time there is, as in Alaska, a long series of specific limitations. The governor may veto legislative acts; but a veto may be overridden by a two-thirds vote of each house. It is made the duty of the governor to submit to each regular session estimates for appropriations for the succeeding biennium. In case the legislature fails to pass appropriation bills to meet current expenses and other legal obligations of the government, the governor is required to call a special session to consider such bills; until these are passed, the sums appropriated in the preceding budget are deemed to have been reappropriated.

Judiciary

Judicial power within the territory is exercised by two sets of courts, territorial and federal. The territorial courts correspond rather closely to our state courts and comprise a supreme court, circuit courts, and such inferior courts as the legislature may create from time to time. The supreme court consists of a chief justice and two associate justices, all of whom must be citizens of Hawaii. They, and the judges of the circuit court also, are appointed by the president and Senate for a four-year term, unless sooner removed by the president. Besides these territorial courts, there is a federal district court consisting of two judges, a district attorney, and a marshal, all of whom are appointed by the president and Senate for a six-year term, unless sooner removed by the president.

Suffrage

A territorial delegate to Congress, without a vote, is also elected by the people every two years. To be qualified to vote for territorial delegate and for members of the legislature, a person must

CHAP. XXX

be a male citizen of the United States, twenty-one years of age, a resident of the territory for at least a year prior to the election, duly registered as a voter, and able to speak, read, and write the English or the Hawaiian language. The effect of these restrictions is to exclude the Chinese and Japanese, who constitute a majority of the population of the islands. In 1918 the legislature was authorized by Congress to extend the suffrage to women possessing the same qualifications as male voters.

The government of Porto Rico

Citizenship and rights

The government of Porto Rico is based on organic acts passed by Congress in 1900 and 1917.[1] The second measure extended United States citizenship for the first time to the residents of the island. Hitherto, they had been neither citizens of the United States nor citizens of a foreign country, but merely citizens of Porto Rico.[2] The act of 1917 also included an elaborate bill of rights covering almost all of the points in the first eight amendments to the national constitution, with the omission of trial by jury and indictment by grand jury. Most statutory laws of the United States not locally inapplicable have the same force and effect in Porto Rico as in the United States proper.

Executive

The "supreme executive power" is vested in the governor, who is appointed by the president and Senate, and who holds office during the pleasure of the president. Six executive departments were created in 1917, namely, (1) a department of justice, with the attorney-general at its head; (2) a department of finance, with the treasurer at its head; and (3) a department of interior, (4) a department of education, (5) a department of agriculture and labor, and (6) a department of health, each with a commissioner at its head. The attorney-general and the commissioner of education are appointed by the president and Senate for four years, unless sooner removed by the president. The heads of the other departments are appointed by the governor and senate of Porto Rico, for a term of four years, unless sooner removed by the governor. These heads of departments collectively form an executive council.[3] The principal financial officer is an auditor appointed by the president for a term of four years, and enjoying very extensive powers. He is, however, under the general supervision of the governor. Corresponding to the territorial secretary in Alaska and Hawaii, is

[1] *U. S. Compiled Statutes* (1918), pp. 557-575.

[2] A. Shaw, "Porto Ricans as Citizens," *Rev. of Revs.*, LXIII, 483-491 (May, 1921).

[3] Until 1917, the executive council, somewhat differently constituted, formed the upper branch of the territorial legislature.

an executive secretary, appointed by the governor and senate of Porto Rico.

Legislature

The Porto Rican legislature also is much like the Hawaiian. The senate consists of nineteen members elected by popular vote for a four-year term; each of seven districts elects two senators, and five others are elected at large. To this body the organic law of 1917 transferred all the purely legislative powers and functions theretofore exercised by the executive council, including confirmation of appointments. The house of representatives consists of thirty-nine members elected every four years, thirty-five of them chosen from single-member districts and four elected at large. In electing the senators and representatives who are chosen at large each voter is permitted to vote for only one candidate for the senate and house respectively. Legislative sessions are held biennially, and special sessions of the senate, or of both houses, may be called by the governor; but no special session may continue for more than ten days. The governor is also required to call the senate in special session in February of each year in which a regular session does not take place.

Public service commission

General legislative powers were conferred on the Porto Rican legislature in 1917 in substantially the same language as in the organic laws of Alaska and Hawaii. But in the case of Porto Rico legislative organization and procedure is regulated in much greater detail than in either of the other territories mentioned. The legislature is denied the right to create new executive departments, but is given authority to consolidate or abolish departments with the consent of the president. Franchises, instead of being conferred by the legislature, are granted by a public service commission consisting of the heads of the executive departments, the auditor, and two commissioners elected by popular vote every four years. Franchises granted by this commission do not, however, become effective until approved by the governor; and they are farther subject to annulment or modification by Congress. The legislature also has the right to enact laws regulating the rates, tariffs, and services of railroads in Porto Rico, and the enforcement of these regulations is placed in the hands of the public service commission.

Budget

The possibility of a deadlock between the two houses over appropriations for the support of the government has been provided for since 1909 in much the same manner as in the organic act of 1900 for Hawaii. If, by the end of the fiscal year, the territorial legislature has failed to make the necessary appropriations for the

ensuing fiscal period, the sums specified in the last appropriation bills are deemed to have been reappropriated. The provision

Veto

relating to the veto power of the governor is unusual, in that it permits an appeal to the president. A bill vetoed by the governor may be repassed by a two-thirds vote of each house, and in case the governor still refuses to approve the measure, it is transmitted to the president, who is given ninety days in which to signify his approval or disapproval; inaction on his part is tantamount to approval. All laws passed by the legislature of Porto Rico have to be transmitted to the president, and are subject to annulment by Congress.

Suffrage

A resident commissioner, corresponding to the territorial delegate from Alaska and Hawaii, is elected by popular vote every four years to represent the Porto Ricans in Congress, without a vote. Voting qualifications are, for the most part, left by the organic acts to be prescribed by the local legislature, subject to the provision that "no property qualification shall ever be imposed upon or required of any voter." Since 1906 citizens of Porto Rico who have resided in the island one year and are twenty-one years of age have been voters, provided they could prove their ability to read and write.

Judiciary

The judicial system of the island is regulated in part by the organic laws of 1900 and 1917, and in part by a series of laws passed by the local legislature in 1904. As in Hawaii, there are two kinds of courts, territorial and federal. At the head of the former stands the supreme court, composed of five justices appointed by the president and Senate for life or good behavior. Below this court are seven district courts, each presided over by one judge appointed by the governor and senate for a term of four years. Provision is also made for a substitute judge to serve whenever any regular judge is incapacitated. Finally, there are thirty-four so-called municipal courts, in as many judicial districts, with limited jurisdiction in civil and criminal cases. In each of those municipal courts there is a single judge who, together with a marshal and a clerk, is elected by popular vote every two years. There are also fifty-one justices of the peace, appointed by the governor and senate. Besides these territorial courts, there is a federal district court with one judge and a marshal, both of whom are appointed by the president and Senate for four years, unless sooner removed.

For nearly three years after the Philippine Islands were ceded

Government of the Philippines

by Spain to the United States they were governed under the direction of the president as commander-in-chief of the army and navy. Despite the military character of this régime, preparations steadily went on from the beginning of American rule for the establishment of a stable civil government. The first step was the appointment by the president, in 1899, of a commission, sometimes called the First Philippine Commission,[1] to investigate conditions in the islands and report facts and recommendations as a basis for farther action by the president and Congress. This commission, it should be observed, was not in any sense a governing body, and in that respect is to be sharply distinguished from the Second Philippine Commission created the following year. The next step was the severance, in March, 1900, of the executive and legislative functions which were then being performed by the military authorities; legislative functions were now assigned to a new commission, the Second Philippine Commission just mentioned; while executive functions continued to be performed, as hitherto, by the military authorities. In addition to its legislative functions, the new civil commission was authorized to provide for the establishment of judicial tribunals and to make all necessary appointments for the proper administration of the civil, judicial, and educational affairs of the government. The point should be stressed that, although this was a civilian commission in its personnel, it was, in legal character, merely a part of the purely military government which was directly responsible to the president and wholly controlled by his instructions. The commission entered upon the performance of its duties in September, 1900.

1. Military government

The third step in working toward a civil basis was taken in March, 1901, when Congress authorized the president to establish a temporary civil government. Under this authority, and no longer acting in his capacity as commander-in-chief, the president appointed the head of the second commission, William H. Taft, to be civil governor; and upon Mr. Taft's inauguration, July 4, 1901, all the executive functions hitherto performed by the military authorities in the pacified provinces[2] were transferred to the governor and the commission. With this event, the commission lost

2. Civil government

[1] The chairman of this commission was Jacob Gould Schurman, then president of Cornell University.

[2] The complete pacification of the islands dates from July 4, 1902, when the office of military governor in the hitherto rebellious provinces was abolished and these provinces were placed under the jurisdiction of the governor and commission.

CHAP. XXX

its quasi-military character, and became in law, as well as in fact, a civil governmental body. As yet, however, the form of the civil government rested solely upon the discretion of the president, to whom authority had been granted to change the form of government at any time. At first the civil commission had consisted solely of Americans; but in September, 1901, the president added three Filipino members and created four executive departments to be presided over by the four American members.[1] Shortly thereafter the office of vice-governor was created.

Organic law of 1902

While this temporary civil government was in operation, Congress was considering plans for a more permanent government, under which the residents of the islands should have some share in governing themselves. The result was the enactment, in July, 1902, of the first organic law for the islands—a measure which, with only slight alterations, continued the government then in existence. The act also expressly declared that the constitution and laws of the United States did not extend to the islands; although it contained a declaration of rights which provided for practically all of the rights guaranteed to citizens of the United States under the constitution, except those of bearing arms and trial by jury. Provision was made also for a representative legislative assembly, to be chosen by popular vote at as early a date as conditions warranted. In 1907 the first Philippine assembly convened and assumed its functions as the lower branch of a legislature whose upper branch consisted of the commission. Thus constituted, the legislature continued to enact laws of local application, subject to the veto of the governor and the disapproval of Congress, until the passage of the Philippine Government Act of 1916, under which the present government of the islands is organized and conducted.[2]

Organic law of 1916

The act of 1916, commonly known as the Jones Act, made three important changes: first, it materially increased the insular government's powers; second, it strengthened the hand of the executive branch; third, it replaced the commission as a legislative body with a senate elected by the people. The "supreme executive" power is vested in the governor-general, appointed by the president and Senate, and holding office during the pleasure of the president. He has large powers of appointment, subject to the approval of the

Executive

[1] When the commission form of government was superseded at the beginning of 1917 there were nine members of the commission, of whom five were Filipinos.

[2] *U. S. Compiled Statutes* (1918), pp. 575-593.

Philippine senate, and also general supervisory control over all departments and bureaus. He also submits the budget, which is the basis of the annual appropriation bills, and, unlike the governor of Porto Rico, he has exclusive power to grant pardons and reprieves, and to remit fines and forfeitures. In general, he has rather broader powers than have been granted to the governors of our other dependencies. There is also a vice-governor, appointed in the same manner, who, in addition to serving in the governor-general's absence or incapacity, acts as head of the department of public instruction, which includes a bureau of public health as well as a bureau of education. The supervising and controlling financial officers are an auditor and a deputy auditor, appointed by the president, with powers similar to those of the auditor of Porto Rico. The five executive departments already in existence were continued by the act of 1916, but the legislature was granted authority to increase the number or to change the names and duties of the departments, with the important qualification that "all executive functions of the government must be directly under the governor-general, or within one of the executive departments under the supervision and control of the governor-general." At the present time (1922) there are six departments, namely, interior, public instruction, finance, justice, agriculture and natural resources, commerce and communication; and each, with the exception of the department of public instruction, is presided over by a Filipino secretary, appointed by the governor-general and Philippine senate.

Legislature

General law-making powers are vested in a legislature consisting of two houses, elected by popular vote, save that two senators and nine representatives are appointed by the governor-general to represent the non-Christian districts. Of the twenty-four senators, twenty-two are elected in eleven districts, each district choosing two for a six-year term; and one-half of the total number are elected every three years. Of the ninety representatives, eighty-one are chosen from single-member districts for a three-year term. The organization and procedure of the legislature are fully covered in the organic law, and provision is made, as in Hawaii and Porto Rico, that if the two houses fall into a deadlock on the budget the appropriations previously made shall be regarded as continuing in force. The governor-general's veto on legislation, with subsequent appeal to the president, is the same as in Porto Rico, except that the president has six months instead of three in which to signify

CHAP. XXX

his approval or disapproval. All acts of the legislature have to be transmitted to Congress, and that body has a right (seldom exercised) to annul any of them.

Council of state and resident commissioners

As a connecting link between the executive and legislative branches there is a council of state, created by executive order, and consisting of the governor-general, the presidents of both houses of the legislature, and the heads of the six executive departments. Two resident commissioners, furthermore, are elected by popular vote every three years to represent the islands in Congress. They are entitled to speak, but not to vote.

Suffrage

The suffrage for the election of these and all other officers has been extended to male persons (except the insane, the feeble-minded, and criminals) twenty-one years of age, who are not citizens or subjects of any foreign country, and who have resided in the Philippines for a year, provided they belong in one of the following classes: (1) persons who, under existing laws, were legal voters in 1916 and had exercised the right of suffrage; (2) persons who own real property valued at five hundred pesos, or who pay the established taxes amounting to fifty pesos annually; and (3) persons who are able to read and write Spanish, English, or a native language.

Judiciary

The judicial system differs from that in Hawaii and Porto Rico in at least one important respect: no provision has been made for any federal court. Cases which would ordinarily come before a federal district court are placed in the jurisdiction of the Philippine courts of first instance. At the head of the judicial system is a supreme court, consisting of a chief justice and eight associate justices, appointed by the president and Senate to serve during good behavior. The chief justice and three of the associate justices are Filipinos; the other five justices are Americans. Below the supreme court are the courts of first instance, consisting of one judge in each of twenty-six judicial districts (except in that of Manila, in which there are four judges), all appointed by the governor-general and Philippine senate. These judges serve during good behavior or until they reach the age of sixty-five, when they are retired. The courts in which they sit correspond to the district, circuit, or county courts of the states, with jurisdiction enlarged, however, to include admiralty, customs, patent, and bankruptcy cases which in the United States proper are ordinarily handled by the federal district courts. Seven auxiliary judges are also appointed by the governor and senate to serve in these courts of first

instance as assistants or as substitutes. Below these higher courts there is a justice of the peace in every municipality and a magistrate in every organized town. So completely has the United States given over the government of the islands to the Filipinos that the supreme court is today (1922) the only branch of the insular government in which Americans form a majority.

The question of independence

The organic act of 1916 contained one farther feature of importance: it asserted the intention of the United States to withdraw sovereignty from the Philippines and to recognize the independence of the islands "as soon as a stable government can be established therein." The measure was the work of a Democratic Congress, and the party's national platform of the same year endorsed the principle of "ultimate independence." The Republican platform denounced the Democratic attitude and declared that the American task in the islands was but half done. The position of the parties in 1920 differed similarly, and the question continues to call out widely varying expressions of opinion. A Democratic governor-general, on retiring from office in 1921 after seven years of service, reported to the president that the Filipino people had established the specified stable government and were therefore entitled to independence. On the other hand, a special mission sent to the islands in 1921 by a Republican president reported with equal tone of assurance that the inhabitants were not yet prepared for full self-government. The Filipinos themselves are divided. A large, and probably increasing, element asks for independence at once, with perhaps a certain international guardianship in the United States; other groups feel that the act of 1916 meets all reasonable present needs and that more experience should be gained before the islands become the full masters of their own affairs. Ultimate independence is probable, but the separation is not likely to take place until after the lapse of some years, and perhaps decades.[1]

Government of minor dependencies

The government of the remaining possessions of the United States must be described very briefly. The Virgin Islands, acquired by purchase from Denmark in 1917, are under the immediate control of the president, in accordance with authority conferred by

1. Virgin Islands

[1] The cause of independence is ably argued in M. M. Kalaw, *The Case for the Filipinos* (New York, 1916), and *Self-Government in the Philippines* (New York, 1919). The author is dean of the University of the Philippines. A similar argument, by a former American governor-general, is F. B. Harrison, *The Corner-Stone of Philippine Independence: a Narrative of Seven Years* (New York, 1922). The adverse report of the commission of 1921, consisting of General Leonard Wood and ex-Governor W. C. Forbes, is printed in *Curr. Hist.*, XV, 678-694 (Jan., 1922).

Congress. The act of March 3, 1917, provided for the temporary government of the islands by placing all civil, military, and judicial powers necessary to their government in the hands of a governor, appointed by the president and Senate, aided by such other persons as the president may appoint, and wielding authority in such manner as he may direct until farther action by Congress. So far as is practicable, the electoral and other local laws enacted under Danish rule remain in force.

2. Panama Canal Zone

The Panama Canal Zone comprises a strip of territory five miles wide on each side of the canal, acquired from the republic of Panama in 1902. During the construction of the canal, the Zone was governed by the president, acting through a commission whose appointment had been authorized by Congress. As the work of construction neared completion, Congress, in 1913, authorized the president to discontinue the commission and to govern the Canal Zone through a governor and such other officials as might be necessary.[1] There is now a "governor of the Canal," appointed by the president and Senate for four years. Provision has been made by law for the establishment of organized towns in the Zone, and for a system of courts beginning with the magistrates' courts corresponding to justices of the peace elsewhere. Above these there is one district court sitting in two divisions, which has original jurisdiction in all felony, and in more important civil, cases, and in equity; it also has the admiralty jurisdiction of a federal district court. The judge of this court, a district attorney, and a marshal, are appointed by the president for a term of four years.

3. Samoa and Guam

Samoa and Guam have never been given any form of government by Congress. They are governed by the president, acting through the Navy Department, which has designated naval officers to be governors of the islands. The officials organize the administration, levy taxes, make such laws as are required, and in general exercise complete authority over the inhabitants. In our smallest insular possessions, the Midway, Howland, Baker's, and Guano islands, neither civil nor military government has yet been provided.[2]

[1] *U. S. Compiled Statutes* (1918), pp. 1651-1657; G. W. Goethals, *Government of the Canal Zone* (Princeton, 1915).

[2] Unlike most other nations having extensive dependencies, the United States has not entrusted colonial supervision to a single executive department. Instead, the War Department, and especially the bureau of insular affairs therein, maintains general supervision over Porto Rico, the Philippines, and the Canal Zone; the minor island dependencies are under the supervision of the Navy Department; and certain phases of administration in Alaska and Hawaii have been assigned to the Department of the Interior.

Over the District of Columbia, as the seat of the national government, the constitution expressly grants to Congress the right to "exercise exclusive legislation in all cases whatsoever." There is no elected legislature; Congress is itself the sole law-making authority.[1] There is, too, no mayor or governor or other single chief executive, but since 1878 executive authority has been vested in a commission of three persons, of whom two are appointed by the president and Senate from among the residents of the District for a four-year term, the third member being detailed by the president from the engineer corps of the army for an indefinite term. These three commissioners, as a body, have extensive powers: they make all municipal appointments; they supervise the local public services, including water-supply, police, fire-protection, schools, and charities; and they have power to make regulations for the protection of life, health, and property. Half of the annual cost of the District government is paid by the United States; the other half is met from taxes paid by the inhabitants of the District, although they have no direct voice in their local government. Not only are the taxpayers and other inhabitants disfranchised in local affairs, but the same is true with respect to national elections as well. Many inhabitants of the District, however, are legal residents of some other place where they are entitled to vote, in many instances by mail. Notwithstanding the denial of direct participation in their own government, "there is probably no municipal government in this country where the opinion of the individual citizen has more influence on local government. The commissioners and the committees of Congress to which bills relating to District matters are referred hold hearings on every measure of local importance, and any person who desires to express an opinion is certain of consideration.[2]

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[1] Art. I, § 8, cl. 17.

[2] C. Moore, in McLaughlin and Hart, *Cyclo. of Amer. Govt.*, I, 603. See also G. W. Hodgkin, "The Constitutional Status of the District of Columbia," *Polit. Sci. Quar.*, XXV, 257-270 (June, 1910); W. F. Dodd, *The Government of the District of Columbia* (Washington, 1909).

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CHAPTER XXXI

THE NATIONAL JUDICIARY

Reasons for a system of national courts

The crowning defect of the government under the Articles of Confederation, wrote Alexander Hamilton in the "Federalist,"[1] was the absence of a national judiciary; and in providing for "a more perfect union" the framers of the constitution declared in the preamble their purpose to "establish justice," and in the third article made provision for a system of courts distinct from the state courts and deriving existence and jurisdiction solely from the national constitution and statutes. That separate national courts were not only appropriate but almost indispensable is manifest when one considers the federal nature of our system of government. The powers of government being divided between the individual states and the central or national government, disputes are certain to arise concerning the proper sphere of each authority. The powers of the national government are delegated and enumerated in the constitution. But who should decide when any branch of that government had exceeded the limits set in the fundamental law? The inherent powers of the states are restricted, both by express grants of power to the national government and by express limitations placed upon the states. But, similarly, who should declare and enforce these constitutional limitations?

Possible modes of adjudicating disputes

There were three possible ways of dealing with such disputes. They might be left to be settled by the courts of the states involved in any given controversy; although, obviously, this would not ensure an impartial and disinterested decision. Or they might be submitted for decision to the arbitration of states which were not concerned with the matters in controversy, after the manner of international arbitral tribunals; but this somewhat doubtful alternative was not given serious consideration. Or, again, they might be referred to national courts; and not only was this plan adopted, but long experience has fully established its wisdom. To be sure, in controversies between the national government and a state over

[1] No. XXII.

the bounds of their respective spheres of authority it can hardly be maintained that the national courts constitute a completely impartial and disinterested tribunal. Looking back over the long history of adjudications in these courts, especially the Supreme Court, one can see a pronounced tendency, except during the period of Chief Justice Taney's influence shortly before the Civil War, to uphold the claims to power advanced by the national government, and to resolve most doubtful questions in favor of the national authorities. Unquestionably there has been bias in favor of the national government as against the states; and in earlier times this was a source of complaint. As national unity, self-consciousness, and pride developed, however, the strong nationalistic propensities of the federal tribunals were regarded with growing approval, and the voices of dissent are not now numerous or strong.

National courts needed to maintain the uniformity and supremacy of national laws

The creation of independent national courts was justified, moreover, by other considerations. If to "establish justice" meant to ensure the security of rights under the national constitution, there must be a uniform system of law, uniformly administered as the "supreme law of the land." How could uniformity and supremacy of national law be secured if the interpretation and administration of the constitution, treaties, and statutes of the United States was left to the courts of the several states? Under such an arrangement there might be as many different final interpretations as there were courts. To assure any degree of uniformity, it was essential that there be a series of tribunals established and maintained by the same authority which makes the treaties and enacts the national laws. And in order that there be a really supreme law of the land, the final interpretation and enforcement of the national constitution, laws, and treaties must reside in one national court paramount to the other national courts and to the highest state courts. Inasmuch, too, as the control of foreign relations is vested exclusively in the national government, it was essential that any legal controversies concerning the status or rights of ambassadors and other representatives of foreign governments should be determined in courts established by the same authority which those governments would hold responsible for any violations of the law of nations, namely, the national government, rather than in courts deriving their authority from the state governments, with which foreign nations can have no direct dealings. Furthermore, in case the national government should itself become a party to a lawsuit with its own citizens, it could hardly be expected to submit to the

decisions of the courts of an inferior state government. National courts, it was also thought, would provide more impartial tribunals than state courts for the decision of boundary disputes or other controversies between two or more states, and of controversies between the citizens of the same state claiming lands under grants of two or more states, or between citizens residing in different states.

The judiciary article

For these various reasons, the makers of the constitution decided upon a national judiciary and put into the instrument a separate article—the third—dealing with the subject. The article is not lengthy. On such matters as the number, composition, and interrelations of the national courts, the members of the convention were not of one mind; and, rather than jeopardize the larger aspects of the plan by haggling over details, they wisely left many things to be determined by Congress later on. So far as the structure of the judiciary was concerned, they provided simply that the national judicial power should be vested in one supreme court and in such inferior courts as Congress might from time to time "ordain and establish." But they covered the essential points: they endowed the national government with judicial power; they fixed the principle of judicial tenure during good behavior; they ordained our present Supreme Court and opened the way for the establishment of such inferior courts as might be found necessary; they protected the rights of citizens by provisions concerning the conduct of trials; they defined the crime of treason; above all, they indicated in language of marvelous conciseness and lucidity, what the range of the judicial power of the national government should be.

Scope of the national judicial power

In order to see what sort of national judicial system has been developed on the basis of these few and simple provisions, we must first inquire into the last matter mentioned, *i.e.*, the scope of the national judicial power. This, of course, will involve some attention to the relations between the national courts and the state courts. Then we must note the organization and workings of the Supreme Court, and of the inferior courts with which Congress has filled out the system on its structural side. Finally, something must be said of the law administered in the courts and of the relations of the judiciary to other branches of the national government.

The first fact to be noted about the scope of the federal judicial power is that the same principle holds here as elsewhere, namely, that the national government has only delegated, enumerated powers. As applied to the judiciary, this means that the national courts have jurisdiction over only those classes of cases specified

CHAP. XXXI

in the constitution, while the state courts have jurisdiction over all others. The grant to the federal courts is made in the following language: "The judicial power [of the United States] shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more states;—between a state and citizens of another state;[1]—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

Federal jurisdiction

A moment's contemplation of this article will show that the judicial power of the United States extends to some cases because of the nature of the matter in controversy and to others because of the status or residence of the parties concerned. The first of these two classes of cases includes (1) all cases in law and equity arising under the constitution, laws, and treaties of the United States, and (2) all cases of admiralty and maritime jurisdiction.

1. On ground of subject-matter

Whenever, in any law suit, a right is asserted which is based upon some provision of the national constitution, laws, or treaties, or when it is asserted that some right secured by the national constitution, statutes, or treaties has been violated by the enactment of a state law or municipal ordinance, the case may be commenced in, and decided by, the federal courts; or, if commenced in a state court, it may, before final decision, be removed to the federal courts. In other words, whenever it becomes essential to a correct decision of a law-suit to obtain an interpretation or application of the national constitution, laws, or treaties, the case comes within "the judicial power of the United States." Cases of "admiralty and maritime jurisdiction," which also come within the federal judicial power, have to do with offenses committed on shipboard, and with contracts which by their nature must be executed partly or wholly on the high seas or "navigable waters of the United States," *e.g.*, contracts for the transportation of passengers and freight, marine insurance policies, contracts for ship's supplies and seamens' wages; and actions to recover damages for torts and other injuries. In time of war, prize cases are also included.

[1] See p. 495, note 1.

2. On ground of the nature of the parties

The second general class of cases comes within the scope of the federal judicial power because of the character or residence of the parties, and comprises (1) all cases affecting ambassadors and other public ministers and consuls; (2) controversies to which the United States is a party; (3) controversies between citizens of different states; (4) disputes between citizens of the same state claiming lands under grants from different states; and (5) cases to which a state is a party. From this last class, however, have been excepted suits brought against a state by the citizens of another state or by the citizens of another country. Such cases, if triable at all, fall exclusively within the jurisdiction of the state courts and cannot be commenced or prosecuted in the federal courts.[1]

Exclusive or concurrent jurisdiction?

It should be noted, however, that from the mere fact that certain classes of cases are specifically mentioned in the constitution as falling within the judicial power of the United States, it does not follow that they are thereby wholly removed from the jurisdiction of the state courts. The constitution, indeed, gives the federal courts no exclusive jurisdiction of any matters whatever; for anything that appears in that instrument, the state courts may exercise jurisdiction concurrently with the federal courts over any or all of the cases mentioned. Congress alone determines by law which of these cases shall be handled exclusively by the federal courts; all others may be tried in the state courts. Under present national statutes, the federal courts have *exclusive* jurisdiction of all suits to which the United States is a party, and of all suits between a state on one side and another state or a foreign nation on the other side; and over the following cases, which may arise under either the constitution or national statutes: crimes, penalties, and seizures, and all admiralty, maritime, patent-right, copyright, and bankruptcy cases. Concurrent jurisdiction is enjoyed by the federal and state courts over practically all other cases falling within the judicial power of the United States.[2] This means that the party

[1] A sovereign state may not be sued, even in its own courts, without its consent. In the case of Chisholm *v.* Georgia in 1793 (2 Dallas, 419) the Supreme Court sustained an action brought against the state of Georgia by a citizen of South Carolina. This was generally regarded as derogatory to the dignity of a sovereign state, and it led to the immediate adoption of the Eleventh Amendment, which excepts from the jurisdiction of federal courts cases brought against a state by citizens of another state or of a foreign state. This incidont has sometimes been referred to as the earliest instance of a "recall of a judicial decision." On the suability of a state, see W. W. Willoughby, *Constitutional Law of the United States*, II, Chap. LIV.

[2] In a few instances Congress has left jurisdiction wholly to the state courts; *e.g.*, suits between citizens of different states where no federal question is in-

CHAP. XXXI

instituting such a case (the plaintiff) has the option of commencing his action in a court of the state where he or the defendant resides, or of bringing it in a federal court.

How cases get into the federal courts:

The actual appearance of cases upon the dockets of various federal courts may be accounted for in one or another of three ways.

1. Original jurisdiction

The most numerous class includes cases over which the federal courts have been given exclusive jurisdiction, and these are, of course, begun and ended in that forum. The least numerous class comprises cases which might have been commenced in either a state or a federal court, at the option of the plaintiff, but have actually been commenced in a state court and thereafter have been transferred at the request of the defendant to a federal court to be finally disposed of there. Such a removal is permissible when either one of two facts can be shown to exist; namely, that the parties reside in different states, or, if they reside in the same state, that a right or immunity is called in question which is based upon the national constitution, laws, or treaties. In the first instance the case is said to have been removed by reason of the "diverse citizenship" of the parties;[1] in the second, removal has taken place because a "federal question" is involved;[2] in either event the removal must take place before the state courts have entered final judgment. Almost without exception, such removal cases go directly to an inferior federal court, rather than to the Supreme Court, although they may ultimately reach that tribunal if an appeal is taken from the decision of the lower court. Removals of this sort are permitted in order to place the defendant on an equal footing with the plaintiff, who had the choice between the federal and state courts when he brought his suit; and also in order to protect the defendant from the danger of local prejudice. Cases in the third class get into the federal courts as the result of appeals from the decisions of the highest court in the state where the action originated. Whenever it becomes necessary for such a state court, in deciding a case, to uphold or deny any right claimed under the national constitution, laws, or treaties, the defeated party may take an appeal, not to an inferior federal court, but directly to the

2. Removal from state courts

3. Appeal from state courts

volved and the amount in controversy is less than $3,000. These cases may not be brought into the federal courts at all, either originally, by removal, or by appeal. J. P. Hall, *Constitutional Law*, 354.

[1] J. C. Rose, *An Elementary Treatise on the Jurisdiction and Procedure of the Federal Courts* (Baltimore, 1915), Chap. VIII.

[2] *Ibid.*, Chaps. VII, XI.

Supreme Court; and there the rights asserted on the one side and denied by the other receive final adjudication.

Kinds of law administered

From the point of view of the kinds of law which the federal courts are called upon to administer, the cases which come before them in one or another of the foregoing ways fall into two great divisions, criminal and civil.

1. Criminal law

The only criminal jurisdiction belonging to the federal courts is such as has been conferred by act of Congress; and Congress, of course, has no authority to define crimes and fix penalties except as it is derived, directly or indirectly, from the constitution. In only five kinds of cases has that instrument directly conferred this authority, namely, (1) piracies and felonies committed on the high seas; (2) offenses against the law of nations, or international law; (3) counterfeiting the securities and current coin of the United States; (4) treason against the United States; and (5) offenses committed in the District of Columbia, in all places wholly under national control, such as forts and arsenals, and in the territories and dependencies, where Congress has ample authority to define crimes and determine their punishments.

Statutory crimes

If, however, the criminal dockets of the federal courts comprised only cases falling within these five classes, the criminal jurisdiction of these tribunals would be quite unimpressive. Actually, the power of Congress to define crimes and provide for their punishment is very much greater than our enumeration would seem to indicate; for whenever Congress has authority under the constitution to pass a law upon a given subject, it has the implied, or resulting, power to make that law effective by decreeing that infractions thereof shall be treated and punished as crimes. The power to establish post-offices, for example, carries with it the implied power to punish the crime of robbing the mails. The most numerous class of criminal offenses now before the federal courts has arisen from violations of laws recently passed to enforce the prohibition amendment to the constitution. Cases of this sort greatly outnumber all other federal offenses put together, and they have enormously added to the criminal work of the courts. As a result, the president, the chief justice of the Supreme Court, and the Attorney-General have recently (1921) urged Congress to authorize a substantial increase of the number of federal judges.[1]

[1] See p. 501, note 2.

CHAP. XXXI

Criminal procedure

Procedure in federal criminal cases[1] is regulated in a large measure by those provisions of the early amendments which are designed to protect the rights of persons accused of crimes by surrounding them with the safeguards against arbitrary and irregular prosecutions originally embodied in the English Bill of Rights of 1689. No civilian, for example, may be put on trial for a federal offense unless he has been indicted by a grand jury, nor be compelled to testify against himself in any criminal case, nor be deprived of life, liberty, or property without due process of law. Persons accused of crimes are entitled to a speedy and public trial by an impartial jury; to a trial in the vicinity where the crime was committed, in order to facilitate the obtaining of witnesses; to be furnished with an exact copy of the indictment; to have witnesses subjected to cross-examination in their presence; to have compulsory process for obtaining witnesses; to have the assistance of counsel for their defense; and to be admitted to bail in a reasonable sum, pending their trial. Furthermore, no person may be twice subjected to trial in a federal court for the same offense if he has once been acquitted on the charge. Criminal prosecutions are instituted and their trials are conducted, on behalf of the government, by district attorneys appointed by the president upon recommendation of the Attorney-General, for each of the eighty-one districts into which the states are divided. In exceptionally important and complicated cases a special district attorney is appointed to represent the government; and the territories have their district attorneys serving in a similar capacity.

2. Civil law

Far outnumbering the criminal cases are the civil cases, which constitute the second great division of actions tried in the federal courts. On the basis of the law administered, three distinct sorts of civil cases must be distinguished: cases at law, cases in equity, and admiralty cases.

(a) Cases at law

Cases at law comprise mainly actions arising out of civil wrongs, called torts, and actions based upon contracts, either express or implied. They rest upon some principle of the old common law of England, or upon some state or federal statute; and they are tried in accordance with the rules of the English common law, or modifications thereof provided for by state[2] or federal

[1] See Rose, *op. cit.*, Chap. III. The only provision in the constitution's "bill of rights" relating to civil procedure is Art. VII, which guarantees a trial by jury in all civil cases in which the amount in controversy exceeds twenty dollars.

[2] In the decision of many cases based upon diverse citizenship of the parties the courts are not called upon to interpret or apply any phase of national law, but merely state laws. For example, if a suit is brought between citizens of

statutes. In most actions at law the redress sought is money damages, and the remedy is granted only after the wrong has been committed or the contract has been broken. At common law, such actions could be brought into the courts only when they could be fitted into some one of about a half-dozen stereotyped and rigid forms of action, such as assumpsit, trover, trespass, replevin, etc. But cases were constantly arising, as they do nowadays, in which substantial justice, or equity, could not be obtained under any of these common-law actions, or even by the award of money damages. There are many cases, for example, in which the granting of money damages to the injured party is an inadequate remedy by reason of the fact that the defendant may refuse to pay the judgment obtained against him and has no property which can be seized and sold to satisfy the judgment. Or it may happen that, owing to the nature of the contract upon which the action is based, it is impossible to estimate the amount of damages which would result from a non-fulfilment of the contract. In still other cases a contract may be involved—for example, a deed conveying title to real estate—which is perfectly regular and legal on its face and is executed with due formality, though the circumstances surrounding its execution have been tainted by fraud, intimidation, or undue influence.

(b) Cases in equity

With a view to supplementing the usual common-law remedies and doing "substantial justice," in such cases as these, by disregarding the inflexible "forms of action," the equity jurisdiction of English and American courts has been built up through the centuries. How equity proceedings accomplish this object will be easily understood if we follow out each of the illustrations given above. Labor strikes often result in injury or destruction of property, for which no adequate money damages can be collected. In equity proceedings a federal court may, by issuing a writ of injunction, command the strikers and their sympathizers to refrain from injuring or destroying property belonging to the employer. Any violation of the terms of an injunction constitutes an offense known as contempt of court, which may be punished severely and summarily by the court whose injunction has been disregarded, without benefit of jury trial for the guilty parties. In this fact, and in the additional point that injunctions may be issued in advance

New York and Pennsylvania regarding land in Pennsylvania, the only law involved in the case and applied by the federal court is the local law of Pennsylvania. See J. P. Hall, *Constitutional Law*, 361-364.

CHAP. XXXI

of any actual injury or destruction, as a means of *preventive* justice, lies the superiority of equity proceedings in such cases over the only alternative at common law, namely, an action for damages after the property has been injured or destroyed.

In the second example given above, where it is impossible to estimate the amount of damages that might result from a breach of contract, as when an operatic or dramatic "star" refuses to carry out a contract with a theater-manager, a court in equity proceedings may order the "specific performance" of the contract if its non-fulfilment is actually threatened, and failure to carry out the contract after performance has been ordered subjects the recalcitrant party to contempt proceedings. In the third class of cases in which the common law furnishes no adequate remedy, a court in equity proceedings may entirely set aside a deed for the transfer of property if it is shown to the satisfaction of the court that the circumstances surrounding the execution of the deed were tainted by fraud, duress, or the exercise of undue influence.

No separate equity courts

The rules and remedies peculiar to equity practice and procedure are enforced by the same federal judges who administer the principles and rules of the common law, and it is always necessary in equity proceedings to establish the fact that the party seeking equity has no adequate remedy at law before a judge will apply the appropriate equity remedy. In its long history in England and in this country equity has come to have its own elaborate and highly technical code of rules and precedents parallel to the complicated rules and procedure in common-law actions. Such rules as are observed and enforced in our federal courts are drawn up, and at long intervals revised, by the judges of the Supreme Court.

(c) Admiralty cases

Not only do the same federal judges administer common law and equity, but they also administer admiralty and maritime law in cases of tort and contract connected with shipping and water-borne commerce on the high seas or "navigable waters of the United States." Such cases are tried and determined in accordance with the highly technical and peculiar rules of the admiralty code inherited from England and modified by acts of Congress. In prize and piracy cases the judges sitting in admiralty courts also administer international law.[1]

Structure of the federal judicial system

Having seen the scope of the national judicial power, the nature of the relations between the national courts and the state courts, the different ways in which cases get into the federal courts, and

[1] W. W. Willoughby, *Constitutional Law of the United States*, II, Chap. LV.

the kinds of law which federal judges are called upon to administer, we are in a position to take up the actual structure or organization of the courts comprised in the federal judicial system. Only one such court, the Supreme Court, is definitely provided for in the constitution; all the others have been created, and their jurisdiction has been determined, by acts of Congress passed at various times, beginning with the Judiciary Act of 1789, which forms the basis of the present organization.

1. District courts

First, in logical order, come the courts of first instance, called district courts, of which there are, in the continental United States, eighty-one (1920).[1] A small state, such as Vermont or New Hampshire, may constitute a district by itself; larger or more populous states may be divided into two or more districts; and in still other cases a district may consist of parts of two or more states. In every district there is at least one district judge, appointed by the president and Senate on recommendation of the Attorney-General. In the more populous districts there may be two, three, or even four district judges, the number depending upon the amount of litigation. Where there is more than one district judge the district court holds its sessions in different "divisions" simultaneously, each division being presided over by a single judge. In all, there are (1921) slightly over one hundred district judges, and the creation of upwards of twenty additional judges is being urged upon Congress in order to relieve the congestion of work in these courts.[2]

Their jurisdiction

The variety of cases which may be brought in the district court is so great that only a few of the more important can be mentioned here. All federal crimes are prosecuted in these tribunals, including those under the anti-trust laws. Admiralty cases, suits arising under the internal revenue, postal, copyright, patent, and bankruptcy laws, or under any law regulating commerce, and likewise cases removed to a federal court from a state court before final judgment, are triable in them. Appeals may be taken directly to the Supreme Court whenever the jurisdiction of the district court is questioned; also in prize cases, and in other cases whenever a "fed-

[1] *Register of the Department of Justice and the Courts of the United States* (28th ed., 1920), 46 ff.

[2] A bill, sponsored by Chief Justice Taft and Attorney-General Daugherty, was introduced in Congress in 1921 providing for the creation of two district judges at large in each of the nine judicial circuits, to be assigned by the senior circuit judge of the several circuits were needed, and by the chief justice to any district in any other circuit. See Chief Justice Taft's discussion of this measure and the need for it, *Jour. Amer. Judic. Soc.*, V, 37-40 (Aug., 1921).

CHAP. XXXI

eral question"[1] is involved. Other cases may be appealed to the circuit court of appeals. The district court itself has no appellate jurisdiction whatsoever; the common impression that cases may be appealed from the highest state courts to the federal district court is quite erroneous.

2. Circuit courts of appeals

Next in order come the circuit courts of appeals, one of which is found in each of the nine great judicial circuits into which the country has been divided. The judges who hold these courts are usually circuit judges, although district judges may be called in to serve. The justices of the Supreme Court also have a right to sit with the court of appeals of their respective circuits, although they seldom find time to avail themselves of the privilege. In circuits having the largest amount of litigation there are four circuit judges; in other circuits, three or two. In any case, two judges constitute a quorum. If the judges are equally divided, the case may be certified to the Supreme Court for instructions or for final decision. As one might infer from its title, the circuit court of appeals has no original jurisdiction; its work is confined wholly to cases appealed from the district courts and to the enforcement and review of certain classes of orders issued by the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Reserve Board. Its decision is final in suits between aliens and citizens, between citizens of different states where no federal question is involved, and in all cases arising under the patent, copyright, and revenue laws, or the law of admiralty (except prize cases), when the amount in controversy does not exceed one thousand dollars. It is likewise final in the great majority of criminal cases. Nevertheless, in any of these instances the Supreme Court may, upon the petition of either party, and before final decision, order the case transferred to itself for review and final decision.[2] The original purpose in the creation of the circuit courts of appeals was to relieve the Supreme Court of some of its appellate jurisdiction, and thus to expedite the final adjudication of large classes of cases.

3. The Supreme Court

At the head of the federal judicial system—in a sense, at the head of the whole judicial system of the United States—stands the Supreme Court. Whereas the creation of the national courts described above was left optional with Congress, the establishment

[1] J. C. Rose, *Elementary Treatise on the Jurisdiction and Procedure of the Federal Courts*, Chap. XVII.

[2] *Ibid.*, Chap. XVIII.

of one court which should be supreme was made mandatory by the constitution; although even here the details of organization and jurisdiction are largely left to congressional action. The Supreme Court was first organized under the Judiciary Act of 1789 with a chief justice and five associate justices. Since then the total number of judges has once been as high as ten, although at the present time (as for some years past) the court consists of nine members.[1] All are appointed by the president and Senate and hold office for life or during good behavior.[2] They receive salaries which are fixed from time to time by Congress, subject to the single constitutional restriction that no judge's compensation shall be diminished while he continues in office. The chief justice now (1922) receives $15,000, and the associate justices $14,500.

The chief justice

Although receiving slightly higher compensation, the chief justice has, in reality, no more legal weight or influence in deciding cases than any of the associate justices. He is simply the presiding justice at sessions of the court, in which he acts as a sort of chairman, in assigning to his associates the task of writing the court's decisions in cases that have been heard and discussed. His position in this respect does not, however, exempt him from performing his share of this kind of work. He also appoints members of the court to serve on committees which now and then prepare a revision of the rules governing equity procedure or the rules of practice in actions at law. In all, ten chief justices have presided over our highest judicial tribunal since its foundation. In chronological order, they are John Jay, 1789-1795 (resigned); John Rutledge, 1795-1796;[3] Oliver Ellsworth, 1796-1800 (resigned); John Marshall, 1801-1834; Roger B. Taney, 1836-1864; Salmon P. Chase, 1864-1873; Morrison R. Waite, 1874-1888; Melville W. Fuller, 1888-1910; Edward D. White, 1910-1921;[4] and William

[1] E. G. Lowry, "The Men of the Supreme Court," *World's Work*, XXVII, 629-641 (Apr., 1914).

[2] Judges of the Supreme Court, and of any other court of the United States when appointed to serve during good behavior, may retire at the age of seventy upon full pay, provided they have served as judge in any such court for a period of ten years. *U. S. Compiled Statutes* (1918), p. 172, § 1237.

[3] John Rutledge presided at only one session of the Court; his appointment was not confirmed by the Senate because of failing mental powers. He had served as associate justice from 1789 to 1791, when he resigned to become chief justice of the supreme court of South Carolina.

[4] Chief Justice White had previously served as associate justice from 1894 to 1910. He and John Rutledge are the only associate justices who have been advanced to the chief justiceship. It has been customary to appoint as chief justice some one who has never before served on the Supreme Court.

CHAP. XXXI

H. Taft,[1] 1921——. The outstanding figure in the list is John Marshall,[2] who for more than thirty years presided over the Court and because of his forceful and winsome personality, his firm and clear convictions in favor of a liberal construction of the powers of the national government, and the masterful logic and lucidity of style with which those convictions were expressed in many a notable decision during the formative period of our national institutions, is justly regarded as "the second father of the constitution." There have been associate justices also whose personality and influence upon our constitutional history entitle them to special mention, namely, James Wilson, 1789-1798; Joseph Story, 1811-1845; Stephen J. Field, 1863-1897; John M. Harlan,[3] 1879-1911; and Oliver Wendell Holmes, 1902——.

Sessions

Each member of the Supreme Court is assigned to one of the nine judicial circuits into which, as we have seen, the country has been divided;[4] and in early days the justices traveled about, holding sessions of the circuit or the district court at different places, and coming together at stated intervals at the capital for a session of the Supreme Court. Nowadays, however, the pressure of business at Washington is altogether too great to permit them to "go on circuit." Sessions of the court are held annually in the old Senate chamber in the Capitol, beginning each year in October and lasting until about May. Six justices must be present at the argument of a case, and a majority must concur in any decision. When the Court is evenly divided, or the members differ so widely that a majority cannot reach any agreement, it is customary to order a rehearing of the case, after which it is usually possible to arrive at some sort of a conclusion.[5]

Decisions and "opinions"

The decisions or conclusions arrived at in each case are accompanied by more or less extended "opinions" showing the line of

[1] S. Spring, "Two Chief Justices" [White and Taft], *Rev. of Revs.*, LXIV, 161-170 (Aug., 1921).

[2] On the influence of Chief Justice Marshall, see series of addresses delivered at the centennial celebration of his appointment, *John Marshall, Life, Character, and Judicial Services*, 3 vols. (Chicago, 1903); W. E. Dodd, "Chief Justice Marshall and Virginia," *Amer. Hist. Rev.*, XII, 776-787 (July, 1907); E. S. Corwin, *John Marshall and the Constitution* (New Haven, 1919); and A. J. Beveridge, *Life of John Marshall*, 4 vols. (Boston, 1916-19).

[3] F. B. Clark, "The Constitutional Doctrines of Justice Harlan," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXIII (1915).

[4] Maps showing the different circuits and the places where federal courts are held may be found in *Register of the Department of Justice and the Courts of the United States* (28th ed., Washington, 1920), 193-204.

[5] A notable instance of this kind occurred when the income tax law of 1894 was held unconstitutional in 1895 (Pollock *v.* Farmer's Loan and Trust Co.).

reasoning by which the Court reached its decision. Justices who concur in the decision of the majority may have arrived at that result in different ways: in such instances, one or more of them may write a "concurring" opinion. Those who are unable to concur in the decision of the majority are likewise permitted to write "dissenting" opinions. All of these opinions are regularly published by the government, for the benefit of the legal profession and the general public, in a series of volumes known as "Reports"[1] prepared under the editorial supervision of a reporter of decisions appointed by the Court. Decisions are handed down by the Supreme Court only in cases that come before it in one of the two ways about to be described. The principle was early established that the Court would refrain from submitting advisory opinions concerning matters presented to it by either Congress or the president.

Jurisdiction

Cases come before the Supreme Court in one of two ways. A few may be commenced there, and over these the Court is said to have "original" jurisdiction. The constitution itself specifies that the Supreme Court shall have original, although not necessarily exclusive, jurisdiction in "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." In view of this provision, Congress may not enlarge the original jurisdiction of the Court, for that would be in effect amending the constitution in an unauthorized manner.[2] The great majority of cases, on the other hand, are brought up to the Supreme Court on appeal from either a lower federal court or the highest state courts; appeals from the latter may be carried to the Supreme Court, however, only when some federal question is involved.

Judicial review of legislation

By far the most important and distinctive function of the Supreme Court is performed when that tribunal decides appeals from the highest state courts and passes upon other federal questions coming before it from the lower federal courts; for, in so

[1] Reports of Supreme Court decisions handed down before 1874 are usually cited by the name of the reporter who prepared them for publication, as follows: Dallas, 4 vols., 1790-1800; Cranch, 9 vols., 1801-1815; Wheaton, 12 vols., 1816-1827; Peters, 16 vols., 1828-1842; Howard, 24 vols., 1843-1860; Black, 2 vols., 1861-1862; and Wallace, 23 vols., 1863-1874. Since 1874 the Reports have been numbered consecutively, beginning with Volume 91, and are cited as 91 U. S., etc.

[2] In 1789 Congress conferred original jurisdiction upon the Supreme Court in mandamus cases, and for that reason a part of the Judiciary Act of 1789 was held void by the Supreme Court in the famous case of Marbury *v.* Madison, 1, Cranch, 137 (1803).

CHAP. XXXI

doing, it acts as the guardian of the constitution, the upholder of the supremacy of national laws, and the defender of the reserved rights of the states. This will appear more clearly if we distinguish two large classes of cases coming before the Supreme Court for final judgment: (1) cases in which it is asserted that a state statute or a provision in a state constitution is in conflict with some clause in the national constitution, or with an act of Congress, or with some national treaty; and (2) cases in which some right or authority or immunity claimed to be derived from the national constitution, statutes, or treaties is in dispute.

How the judicial veto has developed

As an illustration of what occurs in the first class of cases, let us suppose that A., relying upon the validity of a statute passed by his state legislature, brings suit against B. in the appropriate state or federal court, and that, in the course of the litigation, B. denies in legal form that A. has the right claimed under the state law, on the ground that this law is inconsistent with the national constitution, or with a law or treaty of the United States, and that, therefore, the state legislature had no right to pass it. Since the constitution and the laws and treaties of the United States are declared to be "the supreme law of the land," B. prays the Supreme Court to declare null and void the state law upon which A. relies to win his suit. In order to determine the rights of the parties, the Supreme Court is obliged to declare whether, in its judgment, the state law in question is inconsistent with (a) any exclusive grant of authority to the national government in the constitution, or (b) any valid act of Congress or (c) any provision of a treaty of the United States, or (d) any express limitation imposed upon the states by the constitution. If a majority of the members of the Court are convinced that the inconsistency asserted by B. actually exists, the justices, under their oath to support the constitution and laws of the United States as the "supreme law of the land," will refuse to enforce the rights claimed by A. The state statute thus held to be "unconstitutional" may remain on the statute book for years, until the legislature sees fit to repeal it. But every one knows that if a similar case were to arise, the Court would, in all probability, reach the same decision. Therefore, for all practical purposes, the law is null and void, and the Supreme Court is said to have "nullified" it. In this way the Court becomes the organ for declaring and enforcing the constitutional limitations upon the state governments mentioned at the beginning of this chapter. If, instead of an act of a state legislature, a clause

in a state constitution had been in dispute, the court would likewise have been obliged to declare it null and void if a majority of the justices found it repugnant to anything in the national constitution, laws, or treaties.

Federal judicial review of state legislation under the police power

Cases of the latter sort are comparatively rare. But cases involving the constitutionality of state legislation are very numerous. Some state laws are alleged to infringe the right of Congress to regulate interstate commerce; others are said to impair the obligation of contracts, which is prohibited; a very much larger number are challenged because they are thought to be in conflict with clauses in the Fourteenth Amendment prohibiting the states from depriving any person of life, liberty, or property without "due process of law," and from denying to any person "the equal protection of the laws." The state statutes which are most frequently brought into controversy under these clauses are those which have been enacted for the purpose of restricting the rights of liberty and property in order to promote and protect the public health, morals, safety, and general welfare; in other words, legislation enacted by the states in the exercise of their "police power." Such legislation is almost certain to be upheld if the Supreme Court is satisfied that the law in question does not amount to an "unreasonable" interference with the rights of liberty and property, and that it bears a direct relation to the protection of the public health, morals, or safety, or to the promotion of the general welfare. On the whole, the Supreme Court has been much more liberal in its interpretation of the vague phrases "due process of law" and "police power" than many state courts have been when the same or similar questions have come before them. Indeed, the decisions of the Supreme Court in such cases in the past ten or twenty years have had a most important liberalizing influence upon some of the ultra-conservative state courts, as is shown by many decisions of these courts when passing upon the constitutionality of important laws enacted primarily for the welfare of the wage-earning classes.

Judicial review of national laws and treaties

In all of the foregoing cases the Supreme Court serves as the guardian of the powers of the national government against encroachments by the states. Turning to the second class of cases, *i.e.*, those in which one party asserts, and the other denies, some right or immunity derived directly from the national constitution, statutes, or treaties, we find the Supreme Court acting both as the guardian of the reserved rights of the states and as the medium through which the legislative and executive branches of the na-

tional government are restrained from overstepping the boundaries marked out for them in the fundamental law; and this function has resulted from the Court's performance of its ordinary judicial duties quite as naturally and inevitably as has its power to declare state laws unconstitutional. In order to make this clear, let us suppose that Congress has passed a law prohibiting the transportation in interstate commerce of goods in the manufacture of which children under the age of sixteen have been employed. Let us suppose also that A. is prosecuted by the Department of Justice for violating this law, and that he pleads guilty to the charge. In his defense, however, he asserts that the penalty named in the law should not be enforced against him, for the reason that the act of Congress on which the prosecution is based is not a regulation of commerce, which Congress is authorized to enact, but rather an attempt to regulate manufacturing within the states, a subject over which Congress has been granted no authority and which therefore is left to be regulated exclusively by the states. Here, clearly, is a dispute over the boundaries of national and state authority which calls for interpretation of the commerce clause of the constitution, and which must be decided by the Court before it can determine whether to order the enforcement of the penalty prescribed in the law.[1]

How a measure is "declared unconstitutional"

How does the Supreme Court meet such a question? Starting with the premise that the national government is a government of limited powers, which are enumerated in the constitution, that this constitution is the fundamental law to which all other laws and official acts of the government must conform, and that the law-making branch of the government may legally exercise no power for which warrant cannot be found in the constitution, the Court addresses itself to the task of examining the constitution to see if authority to pass this child labor law has been conferred directly or by implication. If it becomes convinced that Congress has exceeded its authority as measured by the constitution (particularly the commerce clause), the Court will refuse to enforce the penalty against A. as demanded by the Department of Justice. The law is declared to be "unconstitutional," and is commonly said to be null and void thereafter, although it may remain on the statute-books for many years. Speaking strictly, all that the Court does is to refuse to order the enforcement of the penalty against A., because

[1] Substantially this same question arose in connection with the child labor act of 1916, held unconstitutional in Hammer *v.* Dagenhart, 247 U. S., 251 (1918).

the alleged law prescribing the penalty is in fact no law at all. But the public knows that a law, or alleged law, which the courts will not enforce is for all practical purposes null and void. If the validity of a national treaty provision is challenged in the course of litigation between parties, a similar line of reasoning is followed by the Court in order to ascertain whether the treaty-making organs of the government have exceeded their authority. In the same manner, too, the Court may be called upon to decide whether an act of Congress encroaches upon the sphere marked out by the constitution for either the judiciary or the executive; and if it does, the Court will be obliged to decline to enforce the law. Thus are the different branches of the government kept within the bounds set for them by the constitution.

Weight attaching to Supreme Court decisions

When the Supreme Court has defined the scope and meaning of clauses in the constitution which are involved in the decision of specific cases, its ruling remains the final authoritative declaration of law upon that point until, as only rarely happens, this decision is reversed or modified;[1] and, as we have seen, under the influence mainly of Chief Justice Marshall, the federal courts, and especially the Supreme Court, have applied such liberal canons of interpretation as to result in a "judicial expansion" of the constitution whereby its various provisions, adopted and understood in the light of eighteenth-century conditions, have been stretched and adapted to meet the vastly different and wholly unforeseen conditions of the twentieth century without the necessity of numerous formal amendments.

The Supreme Court and political controversies

This power of the Supreme Court to declare acts of Congress and provisions in national treaties unconstitutional, and thus virtually nullify them, is thus seen to be the inevitable and logical working out of the ordinary judicial function of determining the rights of parties to litigation coming before it. Naturally, in exercising the power the Court has become, on several occasions, the center of partisan political controversies.[2] Persons who have felt aggrieved by its decisions denying to Congress the right to enact certain legislation have been quick to point out the fact that nowhere in the constitution can any provision be found which expressly confers upon the judiciary this extraordinary and dis-

[1] On the question whether Congress may pass a law contrary to a decision of the Supreme Court, see H. M. Bowman, "Congress and the Supreme Court," *Polit. Sci. Quar.*, XXV, 20-34 (Mar., 1910).

[2] Notable instances are the Dred Scott case in 1857 and the income tax decision of 1895.

CHAP. XXXI

tinctive power; and from this fact some extremists have been led to assert that the framers of the constitution intentionally withheld this authority, and that, therefore, in claiming and exercising the right to veto acts of Congress, the national judiciary has "usurped" power not granted to it.[1] Much time and energy have been expended by students of American constitutional history in trying to ascertain the real intention of the framers of our fundamental law on this point. On the whole, their researches have been rather inconclusive, so far as direct historical evidence is concerned. Nevertheless, the power of our courts to declare acts of Congress unconstitutional, first judicially asserted by the Supreme Court in the case of Marbury *v.* Madison[2] in 1803, is now generally accepted as one of the great bulwarks of both personal and property rights against legislative, and even executive, encroachment.

"Usurper or grantee"?

It is eminently fitting, moreover, that the final determination of the constitutional powers of both the executive and legislative branches of our national government should rest with the judiciary rather than with either the executive or Congress. Upon the action of each of the latter branches the constitution has placed numerous restrictions in the interest of the rights and liberties of the individual. If these authorities were permitted to measure their own powers under the constitution, especially in times of public stress, these restraints would be rendered inoperative in the very emergency which they were designed to meet. Furthermore, the judiciary is the weakest of the three branches of the national government. It controls neither the purse nor the sword. Unassisted, it is unable to attack either of the other branches, or to do serious injury to political or civil liberty. Its members are less likely to be influenced by momentary passion than are the members of Congress —perhaps than even the president. Undoubtedly it is safe to conclude that, with the judiciary possessed of this negative control over Congress and the executive, the limitations of the constitution have been more scrupulously observed and strictly enforced than

The Supreme Court the safest arbiter

[1] This assertion appeared in the platform of the Socialist party in 1916 and in several preceding presidential campaigns. See C. A. Beard, "The Supreme Court: Usurper or Grantee?" *Polit. Sci. Quar.*, XXVII, 1-35 (Mar., 1912), and *The Supreme Court and the Constitution* (New York, 1912). The opposing views on this subject are well set forth in H. A. Davis, "Annulment of Legislation by the Supreme Court," *Amer. Polit. Sci. Rev.*, VII, 541-587 (Nov., 1913), and in a reply to this article by F. E. Melvin, "The Judicial Bulwark of the Constitution," *ibid.*, VIII, 167-203 (May, 1914).

[2] For a criticism of the decision in this case, see E. S. Corwin, *The Doctrine of Judicial Review and the Constitution* (Princeton, 1914), Chap. I.

would otherwise have been the case.[1] Moreover, it ought to be pointed out that the federal judiciary has made very moderate use of its power to veto acts of Congress, and even acts of state legislatures. Only a very small percentage of all the measures passed by Congress and by the several state legislatures since the foundation of the government have been nullified by the judiciary on the ground of unconstitutionality.[2] It is likewise desirable to repeat that the Supreme Court will never pass upon the constitutionality of either an act of Congress or an act of a state legislature unless it becomes necessary to do so in determining the rights of the parties to cases coming before the courts in the ordinary course of litigation. In other words, neither the Supreme Court nor any other federal court will ever hand down "advisory opinions" concerning the constitutionality of legislation that is pending before any law-making body, as is done by the highest courts of some half-dozen states.

Moderate use of the judicial veto

Up to this point, all that has been said concerning the scope of judicial power of the United States and the system of federal courts has been in the nature of a commentary upon the third article of the constitution, which is commonly called the judiciary article; and it should be repeated that the provisions of this article constitute the real foundation of what is called the "federal judicial system." But to stop with a description of the courts which make up this federal judicial system would mean to leave unmentioned several important tribunals which, although created and organized under national authority, do not belong to what are strictly known as the federal courts as described above. In creating and organizing these special courts Congress has a very free hand, with respect to the tenure, compensation, and appointment of judges and also the scope of jurisdiction and methods of procedure. Indeed, when legislating on such courts, Congress is in no way bound by any of the provisions of the judiciary article. It may, for example, provide that the judges shall serve for only limited terms instead of during good behavior; and in several instances it has done so.

National courts outside of the "federal judicial system"

Whence, then, if not from the judiciary article, does Congress derive authority to create these additional national courts? The

Authority for setting up these courts

[1] J. P. Hall, *Constitutional Law*, 35.

[2] The best analysis and tabulation of such cases is to be found in B. F. Moore, "The Supreme Court and Unconstitutional Legislation," *Columbia Univ. Studies in Hist., Econ. and Pub. Law*, LIV, 97-252 (1913).

CHAP. XXXI

answer is, from any one of the following sources: (1) the power to regulate commerce; (2) the power to appropriate money to pay claims against the United States; (3) the power to make all needful rules and regulations for the government of the territories and dependencies, and (4) the grant of exclusive authority over the District of Columbia. A court arising from the first of these sources of authority is the Court of Customs Appeals created in 1909.[1] This tribunal, consisting of five judges appointed by the president and Senate, hears and decides appeals from rulings made by the board of general appraisers in administering the tariff laws. In the great majority of cases its decision is final, although the Supreme Court may assume final jurisdiction in certain matters of exceptional importance. From the second source, Congress derived authority to create, in 1855, the Court of Claims.[2] The five judges of this court, appointed by the president and Senate and holding office during good behavior, investigate claims against the United States arising chiefly out of contracts. The decisions are not, however, enforceable like the judgments of the regular federal courts, but are merely reported to Congress, which may or may not make the appropriations recommended to meet claims which have been allowed. Both this court and the Court of Customs Appeals are primarily administrative courts and perform only quasi-judicial functions. In the last two sources mentioned above Congress finds its authority for establishing in the District of Columbia a court of appeals, a supreme court (inferior to the former), a municipal court, a police court, and a juvenile court. In the organized territories, too, as well as in the island dependencies, the administration of justice has been provided for in regularly organized courts deriving all their authority from acts of Congress.

District attorneys and marshals

To complete this description of the organization of the national courts, mention should be made again of the district attorneys and marshals, who, although not belonging to the federal judiciary in the strict sense, are closely connected with it and are necessary to its successful operation.[3] These officials are appointed by the president and Senate for four-year terms, on recommendation of the Attorney-General. Both a district attorney and a marshal are found in every judicial district. The district attorney presents to the grand jury any cases of violation of national laws which come to his attention; and if that body brings an indictment, it falls

[1] *U. S. Compiled Statutes* (1918), pp. 164-166.
[2] *Ibid.*, pp. 159-164.
[3] See p. 321.

to him to conduct the case of the government against the accused person. His work therefore corresponds to that of county prosecuting officers who act under state authority; and the Attorney-General has a somewhat indefinite supervision over it.[1] The marshals and their deputies are charged with arresting and holding in custody persons accused of crime, summoning jurymen, serving legal processes, executing the judgments of the federal courts, and protecting federal judges from personal violence when engaged in the performance of their official duties.[2]

Relation of the judiciary to other branches of the government

Finally, it is necessary to note some aspects of the relations of the judiciary to the executive and legislative branches. First of all, it should be observed that the framers of the constitution, by declaring that federal judges should hold office "during good behavior," and by prohibiting Congress from diminishing their compensation while they continue in office, sought to free the judiciary from any sense of dependence upon, or undue influence by, either the executive or Congress; and in this they were completely successful, so far as the judges individually are concerned. In performing their official duties, federal judges, individually, are far more independent of outside influences than are most of the state judges, who are elected or appointed for short terms. Nevertheless, the judiciary, as a branch of the government, enjoys no such independence from the other branches as either of them enjoys with respect to the other and to the judicial branch; and the reasons are not far to seek. In the first place, the constitution itself names only one federal court, the Supreme Court, and leaves all inferior courts to be provided for, and their jurisdiction to be defined by, the joint action of Congress and the executive. Second, even in the case of the Supreme Court, Congress and the president have to cooperate in organizing it, in determining the number of judges, in fixing their compensation, and in regulating appellate jurisdiction. Third, all federal judges are appointed by the president and Senate. Finally, the assistance of the executive may become indispensable to the enforcement of the decrees or other processes issued by the courts.

Possibility of partisan interference

As a result of one or more of these circumstances, it is legally possible for Congress and the president to increase the number of judges in any federal court, and, by filling the new positions with

[1] The duties of the district attorney are more fully set forth in *U. S. Compiled Statutes* (1918), pp. 181-182.

[2] On the duties of marshals see *ibid.*, pp. 182-183. Cf. *In re* Neagle, 135 U. S., 1 (1890).

CHAP. XXXI

judges whose views upon questions of public policy coincide with those of the president and a majority of the Senate, overcome or counteract the influence of what would otherwise be a majority of judges holding different views. Or, to take another possible instance, Congress may reduce the size of the Supreme Court, or of any other federal court, by enacting that vacancies shall not be filled until the number of judges reaches a certain diminished point. Congress may even go so far as to deprive the Supreme Court of its appellate jurisdiction over a given class of cases, as once happened during the Reconstruction period following the Civil War, when an unfavorable decision on the constitutionality of certain acts was anticipated. Rarely, however, if at all, has there been clear evidence of an intention on the part of either the president or Congress to "pack," or otherwise influence the decisions of, the Supreme Court. Not quite as much can be said of the inferior federal courts, over which Congress has more direct control. The Federalist Congress in 1801 created new circuit judgeships in order to have a Federalist president fill them with Federalist judges, and a few months later a Jeffersonian-Republican Congress, for equally partisan reasons, abolished the new positions.[1] Happily, however, this instance of avowedly partisan interference with the judicial system stands practically alone; at the time of the latest reorganization of the federal courts, in 1911, when the separate set of circuit courts was abolished, partisan motives were entirely absent, and the same thing was largely true when the short-lived Commerce Court was abolished, in 1913, after an existence of only two years.[2]

Enforcement of court processes

In extreme cases, where enforcement of court processes is resisted by influences too strong to be overcome by the marshals and their deputies, the federal courts are obliged to call upon the president for the aid of the armed forces. If he is unsympathetic toward the court's attitude he may refuse to act, in which event the court is helpless and its orders or decrees may be completely nullified. An instance of this sort occurred in the administration of President Jackson when the Supreme Court upheld certain claims of the Cherokee Indians, while the president sided with the

[1] M. Farrand, "The Judiciary Act of 1801," *Amer. Hist. Rev.*, V, 682-686 (July, 1900); W. S. Carpenter, "Repeal of the Judiciary Act of 1801," *Amer. Polit. Sci. Rev.*, IX, 519-528 (Aug., 1915).

[2] J. A. Fowler, "The Commerce Court," *No. Amer. Rev.*, CXCVII, 464-476 (Apr., 1913).

authorities of the state of Georgia, who forcibly, and successfully, resisted the execution of the court's decision.[1]

Impeachment of judges

Finally, it is legally possible for Congress, from partisan motives, to attack members of the federal judiciary through impeachment proceedings charging individual judges with treason, bribery, or "other high crimes and misdemeanors," as occurred in the impeachment of Judges Pickering and Chase during the presidency of Jefferson. Impeachment is the only method authorized in the constitution for the removal of judges who become unfit for judicial office for any reason whatsoever, including physical, mental, or moral defects. It has been resorted to, in all, in only a half-dozen instances,[2] and has resulted in conviction and removal in only three. A few judges of inferior federal courts have, however, resigned when impeachment proceedings seemed imminent. But in all of this, partisan considerations have played little or no part, except in the two impeachment cases mentioned.

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[1] This incident arose in connection with the cases of The Cherokee Nation *v.* Georgia, 5 Peters, 1 (1831), and Worcester *v.* Georgia, 6 Peters, 515 (1832).

[2] The successful impeachment proceedings were those against John Pickering, 1803-04; West H. Humphreys, 1862; and Robert W. Archbald, 1912-13. The unsuccessful cases were those against Samuel Chase, 1804-05; James H. Peck, 1830-31; and Charles Swayne, 1904-05.

CHAPTER XXXII

POLITICAL PARTIES AND NATIONAL POLITICS

Two sets of political institutions

Any one who desires something more than merely a superficial knowledge of the American system of government must study two sets of political institutions. One may conveniently be described as the machinery of government; the other, as the party system. The first includes the formal organization or structure of our national, state, and local governments, with their executive, legislative, and judicial branches. These formal governmental institutions are more or less fully outlined in the national and state constitutions, in municipal charters, and in the national and state statutes which amplify constitutional provisions. But a study which is restricted to such documents will leave one quite uninformed on the real nature and actual workings of government in the United States; for the effect of many constitutional and statutory provisions, in actual operation, has been widely different from that originally intended. This circumstance is to be explained oftentimes by the customs or unwritten law of political parties in operating the machinery of government; parties, not formal constitutional amendments or statutory enactments, have been responsible for some of the most important changes in our governmental system. To appreciate the truth of this, one has but to recall references in the preceding chapters to the way in which the original purpose of the electoral college has been completely transformed through the rise of political organizations;[1] to the added importance attaching to the presidential office by virtue of the fact that the president is the titular head of his party;[2] and to the fact that the existence of rival parties gives character and color to the whole organization and procedure of Congress, and to much of the legislation enacted by that body.[3] Constitutional documents and statutory enactments create an inert piece of governmental machinery; the motive power for running this machinery and the lubricant which keeps its dif-

[1] See pp. 233-235.

[2] See pp. 282-284.

[3] See Chaps. XXIV-XXV; also W. Wilson, *Constitutional Government in the United States,* Chap. VIII.

ferent parts operating with a fair degree of smoothness are furnished by political parties. Despite their fundamental importance, however, not a word is said about them in the national constitution and very little in state constitutions: they have developed to maturity as extra-constitutional, and also largely extra-legal, institutions.[1]

Uses of political parties

Although their history contains many sordid and selfish chapters, political parties are powerful forces for good in a democracy: they educate and organize public opinion by keeping the people informed on public matters, by discussing every public question in the presence of the people, and by securing not only discussion before the people but, what is quite as important, discussion by the people. In our own country, and in most other democratically governed countries, political parties have become so indispensable that it is hard to conceive of the possibility of getting along without them. They constitute almost the only legitimate channel through which the ordinary citizen can exert a direct influence in the formulation of public policy and the execution of that policy when enacted into law; he finds almost his only point of direct and vital contact with his government when, at the ballot box on primary and election days, he votes for the candidates of one party or another for state and national offices. Parties perform their highest and most legitimate function when they serve as agencies for the application of social, economic, and moral principles to the life of the people. Without organized political action, there can be neither real improvement of social and industrial conditions nor vital changes in government itself.

Why parties arise

Political parties everywhere find their genesis in the inability of all people to think alike; more specifically, in the inability of all people to agree upon what the government should be or do. Those who think alike on these matters naturally come together and arrive at some sort of an organization in order to work the more effectively for the realization of their common objective. Whatever this objective may be, it is, in politics, always best attained by organization. "The most gifted man preaching the clearest truth can do little if he stands alone. He must gather disciples, he must have followers willing to support his cause, or he accomplishes nothing." Political organizations usually have for

[1] Nearly a century and a quarter elapsed before Congress, in 1907, passed the first law regulating party activities; and for about a hundred years there was very little state legislation on the subject.

CHAP. XXXII

their immediate end the control of the government through the winning of elections and the holding of public office. Control of the government means "the power to make and administer law, to levy, collect, and expend public revenues, to undertake and carry on public works, to hold the stewardship of public property, to grant public franchises, to fill public offices, to distribute public employments—to be, in fact, for a given term, *the public* of cities, of states, and of the great nation, in all the handling of their stupendous corporate affairs.[1]

The two-party system

However the party affiliations of individual citizens may happen to be determined—whether by careful study and deliberate decision or by inheritance or environment—the mass of American voters are found supporting one or the other of two great parties that have occupied the center of the political stage throughout most of the period since the adoption of the constitution. This two-party system, as it is called, is a distinguishing characteristic of the politics, not only of the United States, but also of all English-speaking countries, and is found practically nowhere else. Here in the United States we began our history under the constitution with the Federalist and the Jeffersonian Republican parties; then ensued a period in which most voters found themselves in either the Whig or the Democratic party; and since the Civil War the great majority of voters have called themselves Democrats or Republicans.

Minor parties

From the first quarter of the nineteenth century, however, there have been many voters, in the aggregate, who for one reason or another have been dissatisfied with the principles, policies, or leadership of the two major parties for the time being, and who have accordingly started independent or "third-party" movements. First among these organizations came the Anti-Masonic party in 1826 and the years immediately following; then the Liberty party, which appeared about 1840; then the Free Soil party, in 1848; the Native-American, or Knownothing, party, in the early fifties; the Republican party, which was at first a minor third party, in 1854-56; the Prohibition party, in 1872; the Populist party, about 1890; and the Socialist party, about 1897. These and several other minor parties have served a very useful purpose, and at times one or another of them has polled enough votes in pivotal states to change the result of a presidential election.[2]

[1] J. N. Larned, "A Criticism of Two-Party Politics," *Atlantic Monthly*, CVII, 291 (Mar., 1911).

[2] The political history of New York affords several examples. In 1844 the Liberty party's vote in that state was sufficient to throw the state's electoral

CHAP. XXXII

Before the adoption of the constitution there were no political parties in the sense in which that term is now generally understood; as durable and disciplined organizations, parties first appeared in the later portion of Washington's first administration. Their history from that day to this may conveniently be divided into half a dozen fairly distinct periods, namely, (1) the period of Federalist supremacy (1789-1800); (2) the period of Jeffersonian Republican supremacy (1801-1816); (3) the period of "personal politics" (1816-1832); (4) the period of Democratic and Whig rivalry (1832-1860); (5) the period of Republican supremacy (1861-1884); and (6) the period of Democratic and Republican rivalry, since 1884.[1] An attempt will be made in the following pages to summarize the salient features of party history in each of these periods.

Periods of party history

The principal issues between the Federalists and the Jeffersonian Republicans arose out of (1) their attitude toward government and individual liberty; (2) questions of foreign policy; (3) different social and economic interests; and (4) questions of constitutional construction.

1. Federalist supremacy (1789-1800)

Issues:

The Federalists, either by nature or under the influence of economic interests, found it easy to believe in strong government. To them, government existed not merely for the protection of life and property but as an important agency for the promotion of economic prosperity; liberty of the individual was a matter of secondary importance to the establishment of a strong national government. To their opponents, on the other hand, all governments were a necessary evil, to be curbed at every possible point in the interest of individual liberty; the less government there was the better. The national government, in particular, they felt should be restricted in its operation to the narrowest possible sphere compatible with the general welfare. To secure the highest attainable degree of liberty for the individual was, in their view, the all-important objective of organized government.[2]

(a) Liberty and government

vote to James K. Polk, the Democratic candidate, and so to ensure his election over the Whig candidate, Henry Clay; in 1848 the Free Soil party drew away so many votes from Cass, the Democratic nominee, that the Whig candidate, General Taylor, carried the state; and in 1884 the Republicans held the Prohibitionists responsible for the loss of the state and the consequent election of Grover Cleveland. In 1912, and again in 1916 and 1920, no less than six national parties had presidential tickets in the field. In 1920 these were the Republican, Democrat, Socialist, Socialist-Labor, Prohibition, and Farmer-Labor.

[1] These dates must not be taken as rigidly marking the limits of the periods mentioned, for each period shaded off gradually into the succeeding period.

[2] C. E. Merriam, "The Political Theory of Thomas Jefferson," *Polit. Sci.*

CHAP. XXXII

(b) Questions of foreign policy

In the second place, the Federalists and Jeffersonian Republicans were sharply divided over the question of what should be the official attitude of our government toward the principal nations engaged in the wars arising out of the French Revolution. The Federalists, closely bound to England by commercial ties and feeling scant sympathy for the democratic movement in France, naturally favored an alliance with England. The Republicans, instinctively sympathizing with the movement which had overthrown the French monarchy and gratefully remembering the help rendered by France to our cause during the American Revolution, favored alliance with the French. It is difficult to realize today how deeply this line of division cut into the early history of our national politics.

(c) Conflicting economic and social interests

The rivalry of the Federalists and early Republicans also reflected the clash of economic interests and different social standards.[1] The strength of the Federalist party lay in the more populous sections of the North and East, especially the centers where trade and commerce flourished. Among the Federalists one was pretty certain to find the more aristocratic, the commercial, and such capitalistic groups as there were in that period—the elements that had been chiefly instrumental in bringing about the adoption of the new constitution. The Jeffersonian Republicans, on the other hand, recruited their strength mainly from the more sparsely settled and frontier sections, especially in the South and West, where agriculture rather than trade was the dominant economic interest.[2] Here love of individual liberty was strongest; here the expansion of the powers of the national government was viewed with alarm; here class distinctions were less sharply drawn than in the North and East, and social conditions more nearly approached democratic ideals.

(d) Constitutional interpretation

Over important questions of constitutional interpretation also the Federalists and early Republicans were sharply divided at first. The Federalists favored a liberal—their opponents said a loose—construction of the constitution; in all cases of doubt as to whether the national government had power to act, the Federalists attributed the disputed power to that government. They believed in permit-

Quar., XVII, 24-45 (Mar., 1902), and *History of American Political Theories*, Chap. IV.

[1] C. A. Beard, *Economic Origins of Jeffersonian Democracy* (New York, 1915), Chaps. I, VI, VII, XII, XIV; and "Some Economic Origins of the Jeffersonian Democracy," *Amer. Hist. Rev.*, XIX, 282-298 (Jan., 1914).

[2] Beard, *Economic Interpretation of the Constitution of the United States*, Chaps. V, X, XI.

ting the national government to exercise not only the powers expressly granted in the constitution, but also all powers that might fairly be implied from those expressly granted, thus enabling the government to have a wide range of choice of instrumentalities through which to exercise its authority. To Jefferson and his followers, on the other hand, these canons of constitutional construction seemed fraught with grave danger to individual liberty. Accordingly, they advocated a strict—their opponents said a narrow—interpretation of the powers of the national government, such that the government would have been limited to those means which were absolutely indispensable, not merely convenient and not prohibited, for carrying out expressly granted powers; and all cases of doubtful sanction were to be resolved against the national government. By thus restricting national authority to the narrowest possible sphere of activity, individual liberty would be protected from a potentially despotic or tyrannical government.[1]

This difference between the earliest of our great parties over questions of constitutional construction was one of fundamental importance; and it continued to work at least a theoretical cleavage between the dominant parties of each later period. Nevertheless it soon lost all real significance as an actual guide to action in practical politics; for, as we have seen, when the Jeffersonian Republicans came into power in 1801 they found it expedient tacitly to accept and to act upon the liberal constitutional views of their opponents; and in later periods, when important measures were favored or opposed by Whigs, Democrats, or Republicans as constitutional or as unconstitutional, everything has depended upon which party was in power at the time. The party of the "Ins" has always stood more or less frankly for liberal construction of governmental powers; the party of the "Outs" for the time being has, with almost equal regularity, denounced as unconstitutional the important measures favored by the opposing party; neither of the great parties has therefore been entirely consistent on questions of constitutional interpretation.

Federalist achievement and decline

The reaction against the weaknesses and failures of the Confederation period placed the advocates of a strong national government in control of all three branches of the government in 1789 and kept them in such control throughout Washington's two adminis-

[1] These divergent views first appeared in 1791 in connection with the question of the right of Congress to charter a bank to serve as the fiscal agent of the new government. See pp. 425-426.

CHAP. XXXII

trations. Washington himself was neither by instinct nor by training a strong party man; indeed he looked upon parties as evil institutions and warned his countrymen against them,[1] though as time went on he more and more leaned to the Federalist side. These years of Federalist supremacy registered the most important achievements of the party, namely, the establishment of the first Bank of the United States, the enactment of the first tariff (with an unmistakable protectionist slant), the organization and enforcement of a system of national excise taxes, and the assumption of the debts incurred by the old Confederation and by the several states during the Revolution. During John Adams's administration the Federalists continued in power, but steadily declined in actual strength, partly through factional differences, partly as the result of interference with individual liberty in the enforcement of the Alien and Sedition Acts and as a consequence of the burdensome taxation authorized for an anticipated, but unrealized, war with France. Taking advantage of these embarrassments, and of the reaction against Federalist centralizing and aristocratic tendencies, Jefferson organized the various elements of opposition into a coherent party which first secured control of the executive and legislative branches of the government in the presidential election of 1800,[2] and thereafter remained in control, except for two brief intervals, for sixty years.

2. Republican supremacy (1801-1816)

During the sixteen years, or thereabouts, immediately following the partly revolution of 1800, the Federalists maintained a constantly dwindling opposition, whose chief strength lay in New England. Although never again in control of Congress or the presidency, they had the satisfaction of witnessing the gradual "federalization" of the opposing party through its tacit acceptance of most of the results achieved under Federalist auspices. The Jeffersonians, especially after the purchase of Louisiana, became, indeed, almost as liberal in their views of constitutional interpretation as the Federalists themselves; and in the enforcement of the Embargo and Non-Intercourse Acts they were guilty of quite as grave interference with individual liberty as the Federalists had ever been. As for the Federalists themselves, the disloyal attitude of many of their New England leaders and members toward the War of 1812, culminating in the Hartford Convention of 1814, completely discred-

[1] Notably in his Farewell Address. See *Writings of Washington* (ed. by L. B. Evans, New York, 1908), 539.

[2] A. D. Morse, "Causes and Consequences of the Party Revolution of 1800," *Amer. Hist. Assoc. Report* (1894), 531-539.

ited the party. Thenceforth it is never heard of as a factor in national politics, a consummation which was facilitated in no small degree by the conciliatory attitude adopted by Jefferson toward his former opponents. As time went on, it steadily became easier for Federalists to merge with the Jeffersonian following, until, after 1816, party lines practically disappeared. The third period of party history then begins.

3. Period of personal politics (1816-1832)

This period used to be called the "era of good feeling," because, so far as national elections were concerned, all voters seemed to be merged in one great party, the party of Jefferson. Actually, however, it was anything but an era of good feeling, at all events among the party leaders and their immediate followers. Around half a dozen outstanding personalities bitterly hostile factions gradually grouped themselves in the years following Monroe's election in 1816, all claiming to be followers of Jefferson and true exponents of Republican principles; and for this reason the period is more appropriately called "the era of personal politics." There were, for example, the "Adams men," looking to John Quincy Adams for leadership; the "Clay men," similarly looking to the popular young "Harry of the West;" the numerous and noisy followers of General Andrew Jackson, the hero of New Orleans. Smaller, but not inconsiderable, groups supported the presidential aspirations of William H. Crawford of Georgia, a forerunner of the later strict states' rights school of politicians. Others ardently admired the winsome young John C. Calhoun, who was just entering upon a long and brilliant congressional career and had not, as yet, abandoned his strong nationalistic views to become the foremost champion of states' rights. Finally, a smaller group supported DeWitt Clinton of New York, and eagerly applauded his attacks upon the so-called "Virginia dynasty" which had so long seemed to dictate the choice of presidents.

Transitional period

This period in which personalities counted for more than policies was essentially a transitional stage in which the new national issues that were to form the basis of party alignment for the next generation were gradually taking shape. The followers of Clay and Adams soon found themselves in substantial agreement in favoring the enlargement of the activities of the national government; and hence, in order to distinguish themselves from other groups, they began, about 1824, to assume the name *National*-Republicans. They strongly advocated and supported the establishment of the second Bank of the United States, a high protective tariff for the

National-Republicans

CHAP. XXXII

benefit of agricultural and manufacturing interests, and an elaborate system of internal improvements constructed at national expense. The success of this combination in electing John Quincy Adams in 1824 inevitably led the supporters of rival candidates to amalgamate under the leadership of one of the most forceful, picturesque, and dominant personalities in all our political history, Andrew Jackson;[1] and in order to distinguish their views from the nationalistic tendencies of the Clay and Adams men, and to appear to be true followers of Jefferson, they assumed the name *Democratic-Republicans*. With the name soon abbreviated to Democrat, this party became the immediate ancestor of the present Democratic party. It was successful in elevating its leader to the presidency in 1828, reëlecting him in 1832, and electing his chosen successor, Van Buren, in 1836. During these three administrations the National-Republicans had much to say in criticism of the "high-handed," "domineering" and "autocratic" methods of the president; and they liked to represent themselves as the champions of the constitutional rights of the legislative branch of the government against the encroachments of the executive tyrant, "King Andrew." Hence, there was a certain appropriateness in their assumption, about 1832, of the name Whig, imported from England, where a party designated by that term had long been the champion of parliamentary privilege against arbitrary assertions of royal prerogative.

Democratic-Republicans

Whigs

Anti-Masonic party

During this period of party history the first formidable "third-party" movement appeared, in 1826 and the years immediately following. Starting in western New York, where it arose out of popular indignation over the alleged abduction and murder of William Morgan by members of the Masonic order because of his disclosure and publication of Masonic secrets, the movement soon assumed the form of a general hostility toward all secret oath-bound organizations as dangerous institutions, and spread rapidly over New York state into New England and down into Pennsylvania and Maryland. In a lesser degree it also temporarily affected political conditions in other states. The organization reached its zenith in the campaign of 1832, when a presidential ticket was put in the field; but its adherents succeeded in winning the electoral vote of only one state, Vermont. Thereafter the movement receded almost as rapidly as it had advanced, although in the state and local politics

[1] A. D. Morse, "The Political Influence of Andrew Jackson," *Polit. Sci. Quar.*, I, 153-162 (June, 1886).

of Pennsylvania the Anti-Masons continued to be an important factor for upwards of a decade, even electing their candidate for governor in 1835.[1] Most persons who joined the Anti-Masonic party ultimately found their way into the ranks of the National-Republican, or Whig, party; indeed a few men who later became conspicuous Whig leaders, notably William H. Seward, Millard Fillmore, and Thurlow Weed, began their political careers as Anti-Masons. Short-lived as this first third party was, it made one permanent contribution to our national party system, *i.e.*, the national convention as a means of nominating candidates for the presidency and vice-presidency. The first such convention in our history was held by the Anti-Masonic party in 1831, in anticipation of the campaign of 1832.

4. Democratic and Whig rivalry (1832-1860)

The fourth period of party history, *i.e.*, 1832-1860, might as appropriately be called the period of Democratic supremacy as the period of Democratic and Whig rivalry; for, with two brief interruptions, the Democrats were in continuous control of the national government. This long lease of power is largely to be explained by the greater homogeneity of the Democratic party and by its superior organization, enabling it to put forward a comparatively definite and constructive program, and to make a powerful appeal to the electorate. The Whig party, on the other hand, was composed of such diverse, not to say heterogeneous, elements—former National-Republicans, Anti-Masons, Nullifiers, and "Anti-Jackson" men—that it seldom presented a united front or placed before the voters a coherent and forward-looking program. Its chief successes in Congress were largely due to the brilliant personal qualities of such leaders as Henry Clay and Daniel Webster, and later, William H. Seward and Edward Everett; while in presidential elections it owed its two victories almost entirely to its ability to capitalize for campaign purposes the military popularity of William Henry Harrison in 1840 and Zachary Taylor in 1848. Attempting the same thing a third time, in the nomination of Winfield Scott in 1852, the party sustained a crushing defeat from which it never recovered. It showed a few signs of life in the next election, but after 1856 it was never a factor in national politics. Its rapid dissolution after 1850 was hastened by a hopeless division within its own ranks over the question of slavery in the territories, and especially by the

Weaknesses of the Whig party

[1] C. McCarthy, "The Anti-Masonic Party," *Amer. Hist. Assoc. Report* (1902), I, 365-574.

CHAP. XXXII

contemporaneous appearance of a new third party called the Native-American, or Knownothing, party, which drew away both northern and southern Whigs and, in the end, served as a bridge over which most northern Whigs passed into the new Republican party between 1856 and 1860.

Native-American, or Knownothing, party

The appearance of this Native-American, or Knownothing, party was occasioned by the enormous increase of foreign immigration into the United States in the early fifties following the Irish famines, the political revolutions of 1848 in continental Europe, and the discovery of gold in California. The movement was a vigorous protest against the ease with which aliens became naturalized and, therefore, eligible to vote and hold office; against the extent to which these "foreign" voters and office-holders dominated local politics and government; and against the alleged manipulation of this "foreign" vote by Roman Catholic ecclesiastics.[1] At first, the movement assumed the form of a secret oath-bound organization, whose members were pledged to support only native Americans for office. When interrogated by outsiders as to the nature of the society, they were to pretend to know nothing about it; hence the popular nickname, Knownothing. Appearing in the northeastern states early in the fifties, the organization soon spread to nearly all sections of the country and secured an especially strong following in the South. Many voters, especially the old-line Whigs, wearied with the prolonged and ever more acrimonious slavery agitation, welcomed the advent of a new party, founded on a new issue, as a means of escape from the distracting sectional controversy. In 1856 the party attempted to unite upon a presidential ticket; but the northern anti-slavery wing, finding itself seriously at odds with the pro-slavery southern wing, seceded from the national convention which the party held in Philadelphia and later nominated John C. Frémont for the presidency. The southern wing, left in control of the Philadelphia convention, nominated ex-President Millard Fillmore. At the election, Fillmore carried only the single state of Maryland. After the nomination of Frémont by the Republicans, the northern Knownothings merged with that rapidly rising anti-slavery party and ceased to have a separate existence. In the South, on the other hand, the Native American

[1] On the career of the Knownothing party see J. B. McMaster, *With the Fathers* (New York, 1902), 87-106, and "The Riotous Career of the Knownothings," *Forum*, XIV, 524-536 (July, 1894); J. F. Rhodes, *History of the United States Since the Compromise of 1850* (New York, 1900), II, Chap. VII; T. C. Smith, *Parties and Slavery, 1850-1859* (New York, 1906), Chap. X.

party, down to the Civil War, occupied the place formerly held by the old Whig party; indeed, it was practically the southern wing of that party under a new name.

Major party issues after 1832

After the defeat of the movement to recharter the second Bank of the United States, which was the principal issue in the election of 1832, the chief party questions for two or three decades were the tariff, the annexation of Texas, and the status of slavery in the territories, together with a whole group of problems subsidiary to the slavery issue. Within the ranks of both the Whig and Democratic parties were men of all sections holding all sorts of views on the great sectional controversy. Consequently these parties were for many years extremely reluctant to take any positive or aggressive stand on the slavery question, fearing to alienate powerful groups within their membership. Their leaders repeatedly sought refuge in compromises over legislative measures and in evasive platform declarations. Thereby they postponed for at least a decade or two the open rupture between the North and South which finally resulted in the Civil War.[1]

The abolition movement

Nevertheless, almost from the beginning of this period a steadily increasing number of people were deeply impressed with the moral wrong of human slavery and were more and more dissatisfied with the temporizing attitude of both the major parties. This discontent found expression and outlet at first in the non-partisan and non-political Abolition movement which dated from the first appearance of the "Liberator" in 1831, and from the organization of the New England Anti-Slavery Society in 1832 and the American Anti-Slavery Society in the following year. By 1840 the Abolition movement included a considerable number of practical men who believed that agitation in press and pulpit against slavery on moral grounds should be supplemented by organized political activity at the polls; hence the Liberty party was formed in that year, and James G. Birney was nominated for the presidency. Although only a handful of voters were induced to support Birney at that time, the party renominated him four years later and on this occasion drew away enough votes from Henry Clay, the Whig candidate, to enable the Democrats to carry the state of New York and thus elect James K. Polk.

Liberty party

Free Soil party

By 1848 the question of slavery in the territories had become the overshadowing issue in national politics. Thousands of anti-

[1] A. Johnson, "The Nationalizing Influence of Party," *Yale Rev.*, XV, 283-292 (Nov., 1906).

CHAP. XXXII

slavery men who had pinned their faith to the ability of the old parties to prevent the extension of slavery were convinced by the territorial acquisitions following the Mexican War of the incompetence of those parties and of the need of a new party, based upon open and definite opposition to the extension of slavery, and pledged to use all the powers of the national government to prevent slavery from taking root in the national territories. Hence, in the year mentioned, "Conscience Whigs," "Barnburner" Democrats, and Liberty-party men effected a fusion which took the name of Free Soil party. The cardinal principles of this party were non-interference with slavery in the states where it was already established by law, but prevention of any increase of the number of slave states, and full exercise of all the power of the national government to prevent the existence of slavery in any place subject to national jurisdiction. With ex-President Van Buren as its candidate, the new party drew enough votes from Lewis Cass, the Democratic nominee, to enable General Taylor to carry New York and win the election. During the next four years, however, a reaction set in, especially after the compromise measures of 1850; so that the Free Soil vote fell off considerably in 1852.[1]

Origin of the Republican party

Before the election of 1860 came round, the repeal of the Missouri Compromise prohibition of slavery, in the act organizing territorial governments in Kansas and Nebraska in 1854, convinced hundreds of thousands of Whigs and Democrats that the day of compromises on the question of slavery had passed, and that the aggressions of the "slave power" could be stopped only by placing in control of the national government men pledged to the principles of the Free Soil party. The contemporaneous Native-American movement in national politics and the "Maine liquor-law," or prohibition, agitation in state politics had done much to dissolve old party ties; while northern indignation over the repeal of the Missouri Compromise completed the break-up of the Whig party in the North and rent the opposing party into Nebraska and Anti-Nebraska Democrats. The situation was thus ripe for the fusion of all these anti-slavery elements—Liberty-party men, Free Soilers, Anti-slavery Knownothings, and Anti-Nebraska Democrats—into a new organization under a new name. This was the genesis, between 1854 and 1856, of the present Republican party,[2] which has

[1] T. C. Smith, *Liberty and Free Soil Parties in the Northwest* (New York, 1897).

[2] G. S. P. Kleeburg, *The Formation of the Republican Party* (New York, 1911).

the distinction of being the only third party in American history that has succeeded in winning enough supporters to give it control of the national government. In the new party's first presidential campaign, in 1856,[1] its candidate, John C. Frémont, received the astonishing popular vote of more than a million and a quarter, and 114 out of 296 electoral votes.[2] Although Buchanan, the Democratic nominee, was successful, the Republicans felt and acted as if the moral victory had been theirs and girded themselves for the battle of 1860 in which Abraham Lincoln was elected president.[3] The platform on which this victory was won made it very clear that the new party had no intention of interfering with slavery in the states where it existed by state law, but would use every legitimate effort to prevent the acquisition of more slave territory and the creation of more slave states. The new party also fell heir to the protective tariff principles of the Whig party; indeed, in some quarters, notably in Pennsylvania, the tariff plank in the Republican platform of 1860 roused more enthusiasm and attracted more votes than the uncompromising attitude of the party on the subject of slavery.

5. Republican supremacy (1860-1884)

The Union party

When the Republicans won their first national victory the party was still heterogeneous and ill-compacted; on only one fundamental principle were the various elements in hearty agreement, namely, uncompromising opposition to the farther extension of slavery. The outbreak of the Civil War resulted almost immediately in the disappearance of party lines. Loyal Democrats supported all the war measures of President Lincoln's administration and furnished their share of officers and men in the Union army; many of them became temporarily or permanently merged in the Republican party. In recognition of this fusion, and to emphasize the fact that the war was being waged to save the Union and not to enforce a distinctively Republican policy concerning slavery, the name Republican was soon dropped and that of Union party was substituted. In reality, a new party came into being with a new purpose and a distinctive policy. The national convention which renominated President Lincoln in 1864 was neither thought of nor spoken of by its members as a Republican convention, but as the convention of a different party, the Union party, whose great objective was the preservation of the Union regardless of the fate of slavery. After

[1] G. W. Julian, "The First Republican Convention," *Amer. Hist. Rev.*, IV, 313-323 (Jan., 1899).

[2] E. Stanwood, *History of the Presidency*, 276.

[3] E. D. Fite, *The Presidential Campaign of 1860* (New York, 1911).

CHAP. XXXII

Re-birth of the Republican party

the war was over, however, this party quickly disintegrated into radical and conservative factions, which, speaking broadly, coincided with the original Republican and Democratic elements. The conservatives withdrew in large numbers during the exciting congressional campaign of 1866,[1] leaving the Republican radicals in control of the Union party organization. Hence the national convention which nominated General Grant in 1868, while posing as a Union party assemblage, re-introduced the name Republican (calling itself the convention of the National Union Republican party); and by 1872 the former Democrats had so completely left the party that the name Union was dropped altogether. Manifestly there is some exaggeration in the claim often put forward by Republican orators and historians that their party won the Civil War and has enjoyed unbroken continuity since it was first organized at Jackson, Michigan, in 1854.[2]

Democratic rehabilitation

Four or five aspects of party history between 1865 and 1884 stand out with some prominence. (1) By 1876 the Democratic "Solid South" had resulted from the natural reaction of southern whites against the drastic reconstruction policy imposed upon that section by the radical Republicans in control of Congress. Throughout the northern states, also, the Democratic party, which had gone to pieces in 1860 over the question of slavery and had been somewhat discredited by the disloyalty of the "Copperheads" during the war, steadily regained public confidence. At several different times the rehabilitated party had a substantial majority in one house of Congress, and occasionally in both houses; and in 1876 it came within one electoral vote of winning the presidential election.[3] Finally, in 1884, it succeeded, for the first time since 1856, in placing its candidate in the White House.

Republican disintegration

(2) While reintegration may thus be said to have characterized the history of the Democratic party during this period, disintegration was at work in the ranks of their leading opponents. Reaction against the high war-time protective duties, revulsion against the vindictive policy of the radicals toward the former rebels, a desire to restore amity and friendship between the sections, and abhorrence of the unscrupulous application of the spoils system in the

[1] W. A. Dunning, *Reconstruction: Political and Economic* (New York, 1907), Chap. v.

[2] *Ibid.*, "The Second Birth of the Republican Party," *Amer. Hist. Rev.*, XVI, 56-63 (Oct., 1910).

[3] P. L. Haworth, *The Hayes-Tilden Disputed Presidential Election* (New York, 1906).

Liberal Republicans

national government and the unblushing assessment of office-holders for campaign contributions combined to bring about the formation of the Liberal Republican party which nominated Horace Greeley for the presidency in 1872.[1] This nomination was reluctantly endorsed by the Democratic party as holding out the only possible chance of preventing the reëlection of President Grant. Conceivably, the nomination at this juncture of a candidate better qualified for the presidency than Greeley, who was conspicuously ill-fitted for that high office, might have brought success to the combined Liberal Republicans and Democrats. As it was, Greeley was overwhelmingly beaten.[2] Disclosures of corruption in the national government, which came in rapid succession during the next four years, greatly influenced the choice of candidates in 1876. Samuel J. Tilden, of New York, had been identified with the overthrow of the notorious Tweed Ring in New York City (1869-71), and his part in that reform made him governor of his state. In that office he broke up the corrupt Canal Ring, and shortly thereafter, in 1876, the Democratic party made him its candidate for the presidency, on a platform which demanded sweeping reforms in the national government.[3] The Republican nominee, Rutherford B. Hayes, of Ohio, had had a less militant career as a reformer, but was satisfactory to the reform element in the Republican party because of his known friendliness to civil service reform, and because he was understood to favor a policy of reconciliation toward the South.[4] With two such good friends of reform to choose between, the Liberal Republicans found no occasion for putting a rival ticket in the field.

Party issues: the tariff

(3) The old sectional issues connected with the Civil War and Reconstruction occupied the foreground until after the election of 1876. But in the decade following, new issues, primarily of an economic nature, steadily forced their way to the front. At the same time, the traditional differences between the major parties over tariff legislation tended to diminish. The Liberal Republicans, in 1872, had demanded a material reduction of import duties. Nevertheless, the Republican party in general became increasingly identified with the maintenance of a high protective tariff; and at the

[1] E. D. Ross, *The Liberal Republican Movement* (New York, 1919).

[2] H. Watterson, "The Humor and Tragedy of the Greeley Campaign," *Century Magazine*, LXXXV, 27-45 (Nov. 1912).

[3] J. Bigelow, *Life of Samuel J. Tilden*, 2 vols. (New York, 1895).

[4] C. R. Williams, *Life of Rutherford Burchard Hayes*, 2 vols. (New York, 1914).

CHAP. XXXII

same time the Democratic party showed a growing disinclination to make a "tariff for revenue only," and still less a free trade policy, a sharply drawn issue in a presidential campaign. Aside from certain Democratic platform declarations about the "unconstitutionality" of a protective tariff, the difference between the two leading parties on this subject has steadily tended to become merely one concerning the degree of protection to be accorded different sections and industries.

Greenback movement

(4) During the late sixties and the decade of the seventies the currency issue made its first appearance in national politics. The movement for the retention of the "greenbacks" issued during the Civil War and for an increase of the amount in circulation, which drew its main strength from the agricultural states of the Middle West, nearly secured control of the Democratic national organization in 1868, caused much anxiety to both leading parties during the next eight years, and finally resulted in the formation of a new third party in 1876 which nominated Peter Cooper, of New York, for the presidency. Four years later the party changed its name to Greenback Labor Party and nominated James B. Weaver, of Iowa; and again in 1884 it nominated a candidate for the presidency, Benjamin F. Butler, of Massachusetts. Before the next campaign came round the federal Supreme Court decided the last of the Legal Tender Cases,[1] in which the main contention of the Greenback party was upheld, namely, that the national government has authority in time of peace to issue paper money and make it legal tender in the payment of debts. Having thus served its purpose, the party quickly disappeared.

Prohibition movement

(5) Besides the Liberal Republican and Greenback parties, this period saw the appearance of the longest-lived of all our minor or third parties, namely the Prohibition party, which was organized in 1872 mainly to promote the suppression, by state and national law, of the manufacture and sale of intoxicating liquors. This party has put forward a presidential ticket in every presidential campaign since its organization, although the greatest vote that it ever polled fell a little short of 275,000.[2] Only in the election of 1884 did the party draw away enough votes from either of the major parties to exert a possible effect on the result. Republican defeat in that year was in large measure attributed to the disaf-

[1] 110 U. S., 421 (1884). See McLaughlin and Hart, *Cyclopedia of American Government*, II, 322-325.

[2] In 1892.

fection of thousands of Republicans in New York who voted for the prohibition candidate and thus enabled Grover Cleveland to carry that state by a narrow margin.[1] The Prohibition party enjoys the practically unique distinction of having witnessed, within the past few years, the complete embodiment in national and state law of its chief and most distinctive policy, and of having this come about without the party ever having been itself entrusted with the conduct of the national government or placed in control of a single state government.[2]

6. Republican-Democratic rivalry since 1884

The last period of party history is not inappropriately called the period of Republican and Democratic rivalry, for the two parties have contended for control of the national and state governments on more nearly equal terms than previously. During sixteen years of this time the Democrats have been in power in the White House, and often in one or both branches of Congress as well; during the remaining twenty-two years the Republicans have been in similar control.

The Progressive movement

The most outstanding event in the history of the major parties in the period is the disruption of the Republican party, and the resulting formation of the National Progressive party, in 1912. For upwards of five years preceding that upheaval, there had been two more or less antagonistic groups within the Republican ranks. One element, composed largely of the younger generation of party leaders, and called at first the "insurgents" and later the "progressives," wished to commit the party to a lowering of tariff duties and to new policies of social and industrial welfare legislation and increased governmental regulation of big business enterprises. This group also favored the newer instruments or devices of democracy such as the direct primary, popular election of senators, the initiative, the referendum, and the recall.[3] To all of these things the older party leaders—the "standpatters" or "reactionaries," as the progressives called them—were strongly opposed. President Taft's administration, which fell at this juncture, failed to smooth out these differences; on the contrary, it did much to accentuate them. In endeavoring to bring about the renomination of ex-Presi-

[1] It should be said, however, that there are several other possible and adequate explanations for the Republican defeat.

[2] As has been stated, the Greenback party had a somewhat similar fortune. It is not to be inferred, of course, that the adoption of nation-wide prohibition (see p. 213) was brought about wholly, or even mainly, by the Prohibition party.

[3] J. P. Dolliver, "The Forward Movement in the Republican Party," *Outlook*, XCVI, 161-172 (Sept. 24, 1910); F. A. Ogg, *National Progress, 1907-1917*, Chaps. X-XI.

CHAP. XXXII

dent Roosevelt on a "progressive" platform in 1912 the reform elements encountered bitter opposition from the old-line leaders, who did not hesitate, both before and during the sessions of the Republican national convention, to avail themselves of every possible technicality and to resort to dubious rulings to bring about the renomination of President Taft and thus defeat the progressive plans. In these tactics the Taft faction was greatly aided by the over-representation, in the convention, of southern states which never render the least assistance in electing Republican presidents, and where the party organization, largely controlled by federal office-holders, actual or prospective, was easily subject to "administration influences."[1] After one of the longest and most bitterly fought of convention contests, the Roosevelt forces were beaten by sheer force of numbers, and President Taft received the formal Republican nomination.

The National Progressive party

The great majority of progressive Republicans throughout the country now indicated their approval of the proposal to form a new party; and accordingly, in August, the National Progressive convention was held in Chicago for that purpose. Amidst almost unparalleled enthusiasm, the assemblage adopted a long, specific, and forward-looking program of political, social, and economic reforms, and nominated Roosevelt for the presidency and Hiram Johnson, of California, for the vice-presidency. In the election that followed, Roosevelt received over four million popular votes and eighty-eight electoral votes, while the regular Republican nominee received almost three-quarters of a million fewer popular votes and only eight electoral votes. This Republican debacle enabled Woodrow Wilson, the Democratic nominee, to win, although his popular vote fell more than a million short of the combined Progressive and Republican vote. During the next four years the National Progressive party gradually disintegrated, most of its membership being reabsorbed by the Republican party; and in 1916 it put no presidential candidate in the field. Short-lived as it was, however, the party left a deep impress on both national and state legislation; and the full effect of the movement upon the history of the country cannot now, even after the lapse of ten years, be fully appraised.

Major-party issues since 1900

So far as issues between the major parties are concerned, the period under consideration has been marked by the complete disappearance of the old problems connected with the Civil War and Reconstruction. The importance of the tariff as a real party issue

[1] See p. 238.

has steadily dwindled. A new currency question, taking the form of the free silver agitation, for a brief time overshadowed all other questions. About the same time, however, questions pertaining to the control of railroads and the curbing of monopolies or trusts were pressing to the front, and after the subsidence of the free silver movement, these continued to be subjects upon which the two leading parties divided, although even here the differences were not apt to reach to fundamentals. Following the free silver campaign of 1896, an unsuccessful effort was made by the Democratic party in the campaign of 1900 to convince the electorate that, by the retention of Porto Rico and the Philippine Islands, the Republicans were committing the country to a policy of "imperialism" wholly inconsistent with American traditions. Since the opening of the present century, farther regulation of interstate commerce, the reorganization of the country's banking system, the conservation of natural resources, the improvement of industrial and living conditions for the wage-earning classes, and measures for the benefit of the agricultural interests of the nation have received much attention in national party platforms; but these matters again have not developed any fundamental cleavage between the two parties. Likewise, there have been sharp differences of party opinion as to what our foreign policy ought to be, particularly with respect to Mexico, the nations involved in the Great War in Europe, and the League of Nations. On the whole, however, major-party platforms in recent years have presented few clear-cut and sharply defined issues of importance or strongly opposed doctrines or tendencies of thought. Both parties have urged important changes in our national policies, but they have usually differed in detail and degree rather than in fundamental principles. With many voters, indeed, the main questions in recent presidential elections have been these: How far do I wish to go in making changes? To which group of leaders do I prefer to entrust the task of shaping our governmental policy and making our laws? Which party seems likely to give the country the most efficient and economical administration?

Recent minor parties:

Undoubtedly this disappearance of fundamental differences between the major parties has had much to do with the rise since 1890 of three or four minor parties holding comparatively radical views, especially the People's (or Populist) party and the more recent Socialist party. The Populist party developed in the early nineties out of the Farmers' Alliances as an organ of protest against

CHAP. XXXII

1. People's, or Populist, party

existing economic and political conditions, especially in the agricultural regions of the South and West.[1] Assailing both of the old parties for their intimate relations with railroad, banking, and other capitalistic interests of the East—a relationship in which the Populists thought they saw a conspiracy against the welfare of the agricultural classes—the Populists advocated government ownership and operation of railroads and of telephones and telegraphs, postal savings banks, graduated income taxes, and the substitution of national paper money, or greenbacks, for bank notes; and they laid special stress on the necessity for free and unlimited coinage of silver at the ratio of sixteen to one. As remedies for the more distinctively political evils of the day, they urged the popular election of United States senators, the adoption of the initiative and referendum, and the enfranchisement of women. It is hard for one to realize today how extremely radical these policies seemed to the conservative classes of the nineties; to characterize a proposed innovation in the realm of economics or politics as "populistic" was to attach to it a worse stigma than has been implied in the term "socialistic" in more recent years.

Nevertheless the radical movement spread rapidly in the West and South, where conditions were ripe for it; and in 1892 a Populist national convention nominated James B. Weaver, of Iowa, for the presidency and laid plans for a vigorous campaign, based upon a platform embodying the policies just enumerated and unsparingly denouncing both of the old parties. The major parties were astounded to discover, when the ballots were counted, that the Populists not only had polled more than a million popular votes, but had captured twenty-two electoral votes, including the entire vote of four states and a portion of that of two others. In Congress the new party found itself in the enviable position of holding the balance of power in both houses. The triumph, however, was short-lived. With the adoption of the free silver program by the Democrats in 1896, Populist strength melted away, and the party never again influenced a presidential election. Free silver was repudiated by the country in the election of 1896. But other "populistic" policies, such as popular election of senators, woman suffrage, income taxes, postal savings banks, and the initiative and referendum, have since been embodied in national or state laws to

[1] F. E. Haynes, "The New Sectionalism," *Quar. Jour. Econ.*, X, 269-295 (Apr., 1896); F. L. McVey, "The Populist Movement," *Amer. Econ. Assoc. Studies*, I, No. 3 (1896).

such an extent that they are now recognized by Republicans and Democrats alike as sound and orthodox; thus furnishing a substantial basis for the generalization that in the history of American politics the radicalism of yesterday is apt to become the conservatism of tomorrow.

2. Socialist party

The present Socialist party[1] was organized about 1897 and, with the exception of the National Progressive party in 1912, has been the most important of "third" parties in the past quarter of a century. The distinctive politico-economic program of the Socialists calls for "the collective ownership and democratic management" of railroads, telephones and telegraphs, express, steamboat, and other transportation services, and of all large-scale industries; also government ownership of mines, quarries, oil wells, forests, and water power. The social and industrial legislation which is favored differs but slightly from that advocated by the two major parties; and the same is true of many points in the political program, although there are other features, such as the demand for the abolition of the United States Senate, of the veto power of the president, and of the power of the Supreme Court to declare laws unconstitutional, and the demand for direct popular election of president, vice-president, and judges of the federal courts, which find neither standing nor sympathy in more conservative circles. Thus far the Socialist party has never polled a million popular votes, although twice (in 1912 and 1920) it has closely approached that number; nor has it won a single electoral vote in a presidential election. Its only successes in the field of national politics have been the election of a single congressman three or four different times since 1910. In state legislatures, and especially in municipal politics, on the other hand, it has made a much better showing, having elected mayors in such cities as Milwaukee, Schenectady, and Minneapolis.

3. Farmer-Labor party

Between 1916 and 1920 several movements were launched by radical or "liberal" groups for the organization of a new party with more distinctive principles and policies than those of either of the present major parties. One of these movements originated among radical leaders of organized labor, and had in view the creation of an independent labor party, analogous to the powerful British Labor party. Although the plan encountered much open

[1] There is also a more radical Socialist-Labor party which has had a presidential ticket in the field in recent campaigns, but its popular vote has always fallen short of 50,000. See M. Hillquit, *History of Socialism in the United States* (New York, 1903).

CHAP. XXXII

opposition, even denunciation, from conservative labor leaders, an organization was effected, and a national convention was held in Chicago in July, 1920. In the meantime, another organization of persons who liked to call themselves "liberals," under the title of "Committee of Forty-Eight," had been actively at work trying to bring about a fusion of all voters who for any reason were dissatisfied with the programs, policies, or leadership of the major parties. Their national convention met in Chicago concurrently with that of the Independent Labor party; and, after prolonged negotiations, a sort of fusion of the two groups was effected under the title, Farmer-Labor party, a name which it was hoped would appeal strongly not only to the industrial classes in cities but also to the agricultural sections, especially those in which the Non-Partisan League movement [1] had acquired great strength in the few years preceding. The platform of the new party embodied an attempt to combine the divergent views of the "intellectuals" who made up the Committee of Forty-Eight and the radical labor group. The result, however, was disappointing to the authors of the project, for the presidential candidate of the party in 1920, P. P. Christensen, of Utah, received a popular vote of less than two hundred thousand in the entire country.

National party platforms

Since 1832 the principles and policies which a national party has advocated have almost uniformly been set forth in a formal manifesto or appeal to the electorate, and this constitutes the party "platform" which has been mentioned in the preceding pages.[2] Prepared in the first instance by a committee of the national convention, these formal declarations are finally adopted, with or without changes, by the convention itself.[3] Besides stating the principles and policies of the party with varying degrees of fullness and frankness, and reciting the party's achievements, they usually arraign the character, professions, and record of the opposing party or parties. Needless to say, being purely partisan documents, they seldom can be taken at their full face value. With all their defects, however, they cannot be ignored. They at least show what the political leaders think the issues are going to be, or at all events, what they would like them to be.

National party organization

Up to this point attention has been fixed upon the history of national parties, including some of the principal public questions

[1] See references on p. 640, note 1.

[2] All party platforms prior to 1920 are printed in full in the two volumes of E. Stanwood, *History of the Presidency* (Boston, 1906-16).

[3] See pp. 243-244.

upon which parties have divided at different periods. Something remains to be said of the organization or machinery by which national parties in recent years have attained, or sought to attain, their chief objective, namely, control of the government through winning elections and holding public offices. In the case of the major parties, this machinery has consisted, since about 1840, of two series of committees. One series confines its activities almost wholly to the election of the president, vice-president, senators, and representatives in Congress; and this part of the machinery alone will be spoken of in the present chapter. The other series attends to the same sort of work in connection with the election of state and local officers, and its description will more appropriately appear in a later chapter on parties and politics in the states.[1] National and state elections take place largely at the same time, however, so that during a presidential campaign the two sets of committees usually coöperate closely.

The national committee

Mention has already been made of the national committee of each party, consisting of one member from each state, territory, and dependency, and from the District of Columbia,[2] nominally elected once in four years by the national convention, but in reality usually selected by the several state delegations in that body. If, however, state laws require the choice of national committeement to be made in a party primary, such election is regarded as a nomination to the convention and is ratified as a matter of course. The chief functions of the national committee are to decide upon the time and place of holding the national convention, to issue the formal call for the election of delegates, to make preliminary arrangements for the convention, to make up the temporary roll, and, after the convention adjourns, to select a national chairman (in consultation with the presidential candidate) and to assist him in the detailed conduct of the campaign. Between presidential elections the committee usually falls into a state of suspended animation until the approach of the time for the next national convention, although in recent years permanent headquarters, in charge of a permanent staff, have been maintained more or less continuously between presidential elections.

At the head of the national committee, and serving as com-

[1] See Chap. XLII.

[2] The Panama Canal Zone is also represented in the Democratic national committee. The Democrats now have a woman's national committee, constituted in the same manner as the men's committee, and the Republicans are developing a similar organization among their women voters.

CHAP. XXXII

The national chairman and other officers

mander-in-chief of the party's forces throughout the campaign, is the national chairman, nominally elected by the committee but in reality the personal choice of the presidential candidate. To the chairman the committee transfers practically all responsibility, with full authority to manage the campaign in all its varied aspects.[1] It endeavors, however, to assist him in every possible way in the execution of the plans which he maps out. The other principal party officials consist of one or more vice-chairmen, elected by the national committee or appointed by its chairman, a secretary and an assistant secretary, and a treasurer. An executive committee is named by the national chairman, the members of which serve as his staff officers and advisers during the campaign. In 1920 the Republican executive committee consisted of eleven men (part of whom were members of the national committee), eight women, and four ex-officio members including both men and women. The Democratic executive committee consisted of seventeen men and an equal number of women. Sub-committees of the national committee, and a large number of outside auxiliary committees, are also called into existence and kept actively at work obtaining funds with which to meet the enormous expenses of a presidential campaign, preparing and distributing campaign literature, engaging and assigning campaign speakers, organizing and stimulating campaign clubs among different classes of voters, enrolling first voters, keeping in close touch with different state party committees, and correllating and harmonizing the activities of all the auxiliary committees.[2]

Congressional and senatorial campaign committees

Comparatively inconspicuous in presidential campaigns, but prominently active in connection with congressional and senatorial elections occurring between presidential elections, are the congressional and senatorial committees which assist in the election of members of Congress bearing their respective party labels. The Republican congressional committee is composed of one congressman from each state having a Republican member in the House of Representatives, nominated by the state delegation and formally elected by a joint caucus of the Republican senators and representatives. The officers, consisting of a chairman, two vice-chairmen, a secretary, and a treasurer, as well as an executive committee of fifteen members, are elected by the general committee.

[1] H. Croly, *Marcus Alonzo Hanna* (New York, 1912), Chaps. XVI, XXI.

[2] P. O. Ray, *Introduction to Political Parties and Practical Politics* (rev. ed.), Chaps. VIII-IX.

The Democratic congressional committee consists of one member from each state. Usually he is a member of the House of Representatives, and if so, is selected by the delegation from that state. But if the state is without a Democratic representative, the committee chairman appoints some one, usually an ex-member, to represent it. The chairman is elected by the committee, and he appoints the other officers, an executive committee, and such other committees as may be needed. Since the adoption of popular election of senators, similar committees have been organized by both parties to assist in the election of party candidates for the Senate.

Party finance

The efficient performance of the work assigned to these various party committees, especially in a presidential campaign, involves the collection and disbursement of large sums of money; indeed, their first, and often their principal, task is to raise money, *i.e.*, a "campaign fund." Prior to the campaign of 1920, the maximum expenditures appear to have been made in the "free silver" campaign of 1896. At that time, as the private papers and audited accounts of the late Senator Hanna, Republican national chairman, show, the Republicans raised and spent slightly less than $3,500,000 to help elect President McKinley.[1] No official records of national campaign expenditures were kept, or at least published, until 1908. But since that date we have something more than mere estimate or conjecture to rely on, for full publicity of both contributions and expenditures has either been made voluntarily or, since 1910, required by national law. From these official statements it appears that in 1908 the Democratic national committee expended about $620,000, and the Republican committee, $1,655,518; in 1912, the Democrats spent over $1,300,000, the Republicans, $1,070,000, and the Progressives, over $670,000; in 1916, Democratic disbursements amounted to $1,958,508, those of the Republicans came to $3,829,260; while in 1920, the Democratic national committee spent $1,318,274, and the Republican, $5,319,729. And both committees, in the last-mentioned year, reported a deficit at the end of the campaign.

Expenditures in recent campaigns

It is to be observed that these large sums were spent by the national committees alone. In addition, the Republican congressional committee spent, in 1920, $375,969, and the Democratic congressional committee, $24,498; at the same time, the Republican senatorial committee expended $326,980, and the corresponding Democratic committee, $6,675. Furthermore, these amounts were

[1] H. Croly, *Marcus Alonzo Hanna,* 218-220.

CHAP. XXXII

all expended after the national conventions had been held. But in the pre-convention campaign the expenditures by rival aspirants for a presidential nomination also surpassed all known previous records: Democratic aspirants spent the comparatively small sum of $122,000, but among the Republicans, where the competition was far more spirited, the outlay totalled $2,250,000.[1]

Some increase clearly legitimate

The expenditure of such enormous sums in an effort either to secure a presidential nomination at the hands of a national convention or to enable a party to win the presidential election has been regarded by many as fraught with sinister possibilities for our democratic institutions. Yet it has to be said that almost no evidence has come to light that any considerable portion of these sums was expended in an effort to corrupt the electorate. Indeed, every dollar might easily have been expended in perfectly legitimate ways.[2] The fact is that the "cost of living" for candidates and for political organizations has mounted by leaps and bounds in the past few years along with the cost of living for every one else. Campaigning is vastly more expensive nowadays than it used to be. With upwards of fifty million voters to be reached in one way or another, millions of dollars may easily be expended without fully covering the field. In 1912 a little more than fifteen million voters participated in the presidential election. To have sent to every voter only one circular letter, costing five cents each for stationery, postage, and typing, would alone have amounted to $750,000. Since that year the electorate has been more than doubled by the extension of the suffrage to women; so that at least $1,500,000 would now be required for such an item alone. And it scarcely needs to be said that there are countless other ways in which to spend money legitimately.

The question of statutory regulation

Many people are strongly of the opinion that some thoroughgoing limitation upon national campaign expenditures ought to be established by law. Thus far, however, no satisfactory plan has been advanced. Many states have laws which restrict, in one way or another, the amount of money that may be expended in state campaigns, but thus far Congress has passed only one or

[1] In 1920 both pre-convention and national campaign expenditures were subjected to a searching investigation by the Kenyon committee, a sub-committee of the Senate committee on privileges and elections. A large amount of testimony was taken, which is published in two volumes (Washington, 1921). The conclusions of the committee are printed at the end of the second volume.

[2] P. O. Ray, *Introduction to Political Parties and Practical Politics* (rev. ed.), Chap. XI; H. Parsons, "Why a Political Party Needs Money," *Outlook*, XCVI, 351-356 (Oct. 15, 1910).

two measures upon the subject. An act of 1910 undertook to restrict to five thousand dollars the amount which a candidate for representative in Congress might spend in connection with his nomination and election, and, similarly, to ten thousand dollars the amount which a senatorial candidate might spend, exclusive of personal expenses for travel, subsistence, stationery and postage, and a few other specified items. But the Supreme Court has held this law to be unconstitutional in so far as it applies to expenditures connected with direct primaries. The only other national law on the general subject was passed in 1907 prohibiting contributions by any corporation to any campaign in connection with the election of president, vice-president, senators, and representatives, and also prohibiting corporations created under national law from contributing to any campaign whatsoever.[1] Though actual abuses are less numerous and less flagrant—at all events in national elections—than is rather widely supposed, the regulation of the use of money in connection with campaigns and elections is unquestionably one of the most important problems in the field of both national and state politics. Unfortunately, it is a problem for which no satisfactory solution is in sight.

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PART IV. STATE GOVERNMENT

CHAPTER XXXIII

IMPORTANCE AND COMMON FEATURES OF THE STATES

The states as fundamental units in the American governmental system

The power, importance, and prestige of our national government must not be allowed to obscure the fact that practically every citizen of the United States is at the same time a citizen of some state and an inhabitant of a subdivision of a state called a county, and of some fraction of a county called variously a town or township, village, borough, or city. Indeed, no one can understand our federal system of government who is not fully acquainted with the intimate relations existing between the states and the national government; for "the state is the pivot around which the whole American political system revolves." One must always remember that what we call our national government originally resulted from a union of *states,* and that to-day it rests as truly as ever upon a union of states; hence the significance and appropriateness of the name, the *United States* of America.

Furthermore, the states are the units upon which the great national political parties are organized; the states determine who may vote for representatives and senators in Congress, and for presidential electors; the states mark out the congressional districts from which representatives are sent to Congress, and also prescribe by law the regulations governing the nomination and election of senators, representatives, and presidential electors. Whenever it becomes necessary for the House of Representatives to choose a president, the representatives vote by states, each state having a single vote. Finally, all proposed amendments to the national constitution require ratification by state action before they become effective.

In spite of the fact that the states are thus absolutely essential to the successful operation of our national government, surprisingly few citizens know as much about state and local government and politics as about the national government and national politics;

CHAP. XXXIII

The citizen in closer contact with state and local governments than with the national government

and so very few people really know anything about county government that the county has been aptly termed "the dark continent of American politics."[1] This is the more curious since our points of daily contact with these nearer and less well-known governments are vastly more numerous than our points of contact with the national government; for there is scarcely a period or an activity in the life-history of the average person born in the United States which is not in some measure, either directly or indirectly, touched, influenced, regulated, or controlled by state laws, or by local ordinances which derive their authority from state laws.

Thus, at birth and later in periods of illness the citizen is attended by physicians and nurses whose qualifications and right to practise their professions have been determined under some state authorization; and when he dies, the burial permit and the undertaker's license are issued by some state or local officer. The elementary, secondary, and high schools in which the citizen and his children are educated are provided and supported under state authority; while, for higher general, professional, or technical education every state maintains at least one state college, university, or school of technology. When the period of schooling is over and the young citizen enters a trade, business, or profession, he is likely to find that state laws prescribe more or less minutely the conditions under which his occupation or profession may be carried on, and regulate the making and enforcing of contracts in the ordinary course of his business. If he marries and rears a family, he finds that the domestic relations, such as marriage and divorce and the relations of husband and wife, parent and child, and guardian and ward, are regulated by state, rather than national, laws. Similarly, the state determines the citizen's right to vote and to hold most public offices, and his right to acquire and hold property and bequeath it at his death. If at any time he becomes involved in a lawsuit, or is charged with some crime, his rights and liabilities in the one case and his guilt or innocence in the other will be determined, in the great majority of instances, by state and local, rather than by national, courts. The care of his poverty-stricken fellow citizens, the maintenance of institutions for the insane and the blind, and of reformatories and penitentiaries for the delinquent and criminal classes, are state, not national, activities. If he

[1] H. S. Gilbertson, *The County: the Dark Continent of American Politics* (New York, 1916).

lives in a city or incorporated village or borough, the streets along which he moves to and from his daily work are usually laid out, paved, cleaned, lighted, and kept safe for traffic by the local authorities; and the same local authorities are commonly responsible for providing the inhabitants with an abundant supply of pure water and an adequate sewerage system, with fire and police protection, and with parks and other recreational facilities. Often, too, the local authorities have much to do with the regulation of such public utilities as gas, electricity, and transportation. And finally, whenever a citizen is prosperous enough to become a taxpayer, he quickly discovers that the greater part of his taxes, at any rate the taxes which affect him most directly, are the ones assessed, collected, and expended by state and local governing bodies.

Self-interest should impel to a close study of state and local government

Accordingly, it would seem that considerations of enlightened self-interest, if no others, ought to be sufficient to stimulate men and women to become familiar with the organization and workings of their state, county, and local governments, and to take an active part in the selection of the public officials who are charged with the carrying on of these governments. We feel the effects of corrupt or inefficient state and local government far more keenly than we feel the results of inefficiency and corruption in the national government.

Such study will assist in distinguishing true and false democratic institutions

A farther stimulus to the study of state and local government should flow from a realization of the fact that a thorough understanding of the structure and actual operations of the state and local governments will enable a person more readily to distinguish between true and false democrats, between genuine and counterfeit democratic institutions and practices. And here in the United States to-day we stand in peculiar need of being able to make these distinctions; for no one in our country shouts louder for democracy and more persistently demands "government by the people" than the petty tyrants whom we call political bosses, and their camouflaged oligarchies which we denounce as political machines, and whose sordid and undemocratic manipulations of our governmental institutions we stigmatize as bossism or machine rule. Probably the most frequent and flagrant instances in which these false democrats, in the name of democracy but with selfish and sinister purposes, have foisted upon the people institutions and practices which are essentially undemocratic, or have perverted to

CHAP. XXXIII

base uses institutions originally created for the promotion of democracy, are to be found in connection with our state, county, and city governments.

Characteristics of genuinely democratic government:

In order to be able to distinguish clearly between true and false democratic institutions and practices, the citizen should constantly bear in mind what the most essential features of genuinely democratic government are. These features, or characteristics, may be reduced to three; although each of them suggests some large questions which it will be our duty to consider. In the first place,

1. Universal adult suffrage, few elective offices, and adequate election laws

the great majority of the adult population must have a voice in the selection of public officials, and through these officials must have a voice in the determination of public policy as expressed in national and state laws. As a nation, we have only just achieved this essential of truly democratic government with the complete enfranchisement of women. If the electorate is to play a real, and not a sham, part in government, the duties imposed upon it must be such as can be performed intelligently and with a reasonable expenditure of time and effort. In determining these duties, due consideration must be given to the fact that the average citizen can devote only a very small part of his or her time to political activity or to acquiring information about candidates for public office. Is, therefore, genuinely democratic government more likely to be promoted by a "short ballot," which means the filling of only a few offices by popular election, or is it more likely to be promoted by multiplying the number of elective officers? Another question which suggests itself in this connection is whether voting is a duty or a privilege; and if a duty, whether it is right or expedient to compel every person to perform that duty.

The electorate in a genuinely democratic community must be able to express its will easily and clearly on election day, amid favorable surroundings, and must have that will fairly and accurately ascertained and recorded by honest and competent election officials. How do our ballot laws and our registration, primary, and election laws meet this test? Lastly, does genuinely democratic government require that the electorate shall retain in its own hands the right to remove abruptly from office any public official who proves dishonest, incompetent, or otherwise unsatisfactory, and to elect a substitute for the unexpired term? In other words, does the recall of elective officers contribute to true democracy?

The second essential of democratic government is that agencies be provided whereby the will of the voters, as expressed at an

election upon broad questions of public policy, can be embodied in law with the least possible friction and delay. Many questions immediately suggest themselves when one attempts to apply this test to our state and local governments. Is a state legislature or a city council likely to serve the interests of democracy better if organized in one house or in two houses? Is the organization of our state legislatures, and are their methods of transacting business, adapted to carry out the public will promptly, or rather to defeat, or at least to side-track and delay, the popular will when it runs counter to the plans of bosses, machines, or special interests? Will true democratic government be promoted by giving to the electorate the ultimate voice in deciding what measures shall, and what ones shall not, become laws; in other words, is democratic government promoted by the adoption of the initiative and the referendum?

2. Effective legislative organs

The third essential, and one which is quite as important as the other two, is suitable means for carrying into execution the public will as enacted into law by the state legislature or the city council, including means whereby, in event of the failure of such execution, the electorate may know exactly where to locate the responsibility. Real democratic government is not, despite what we have often been told, all a matter of the heart or merely a question of electing the best men to office. A good mechanic will, of course, get better results than a poor one, using the same defective tools; similarly, able and honest public officials will get better results than incapable and dishonest officials, operating the same clumsy and cumbersome governmental machinery. But in order to achieve the best results a democracy must provide its agents with the best possible instruments with which to work. Reform of governmental machinery ought, therefore, to go hand in hand with the election of good men to office. Are the executive and administrative organs of our state, county, and city governments so organized as to operate and coöperate smoothly, efficiently, and economically in the public interest? Are our state courts as well organized as they should be? Do our methods of selecting and retiring judges work in the interest of democracy or otherwise? Do the prevailing methods of administering justice in civil cases make for the impartial determination of the rights of rich and poor, without undue delay, expense, or regard for mere technicalities? Do the prevailing methods of criminal procedure adequately protect the rights of the accused, and also the rights of the community? Is it essential that

3. Easily located and enforced responsibility for the administration of laws

CHAP. XXXIII

the judicial servants of the people have the right to declare null and void laws passed by the legislative servants of the people?

All of the foregoing questions, and doubtless many others, will present themselves to the conscientious citizen when he begins to apply the several tests of democratic government that have been mentioned. It is hoped that in the chapters which follow sufficient facts will be presented to enable the thoughtful reader to answer at least some of them to his reasonable satisfaction.

Before entering upon a detailed study, however, of our state and local governments, the fact should be brought out that, although the forty-eight state governments differ greatly one from another in details, they are organized, in general, on substantially the same lines, and hence correspond rather closely in their most conspicuous and important features. This will appear from a summary of the principal aspects which they have in common.

Features common to all of the states:

The United States is a union of states which are on a footing of legal equality one with another; and, so far as their representation in the Senate is concerned, they are on a footing of political equality as well. In other words, no rights or privileges are enjoyed by one state or group of states which do not at the same time appertain to all other states in the Union. This equality of the states is a fundamental principle of our constitutional system.[1]

1. Legal equality

2. Native or inherent powers

Although somewhat circumscribed by the express and implied limitations contained in the national constitution, the sphere of state activity is still far more extensive than that of the national government, and in that sphere each state is supreme; its powers are native and inherent, not delegated as are the powers of the national government.

3. A written constitution

Every state has a written constitution which determines the organs of state and local government, defines their respective powers and functions, and guarantees the fundamental civil rights of its citizens. This constitution is the fundamental organic law to which all state legislation and local ordinances or regulations must conform. A state is at liberty to put almost anything it sees fit into its constitution. But any provisions which conflict with the national constitution, or with acts of Congress or treaties of the United States, will be held by the courts, after proper legal proceedings, to be null and void.

[1] It constitutes no impairment of this legal equality for Congress to impose conditions with which the people of a territory must comply before their admission into the Union as a state. See p. 164.

Every state has a single chief executive called the governor, who in all states except one is elected by direct popular vote; in Mississippi he is chosen by popular vote supplemented by action of the legislature. The state governorship has descended directly from the office of governor in the colonial period.

4. A single chief executive

Every state has a representative law-making body made up of persons chosen by direct vote of the electorate. This legislative body is usually called the general assembly. In New Hampshire and Massachusetts, however, it is known as the "general court," a name inherited from the time when the meeting of the general membership of the Massachusetts Bay Company, called the general court, was the only law-making body in the colony.

5. A representative legislature

The legislature in every state is a two-chambered, or bicameral, body, consisting of what are generally called a house of representatives and a senate. In the case of the original thirteen states, the bicameral legislature developed naturally out of usages which were prevalent in the colonial period. In the earliest colonial assemblies the governor and his council, both appointed in almost all of the colonies by the crown or by the proprietor, and therefore in no sense politically responsible to the colonists, sat with elected local representatives in the enacting of laws. Sooner or later, friction arose between the aristocratic and monarchical elements in the colony, represented by the governor and his council, and the more democratic elements comprising the mass of the inhabitants; and in every colony except Pennsylvania, Delaware, and Georgia, this resulted in a separation of the two groups of members. Each group continued to have a voice in the making of laws, but they henceforth sat apart. The assembly, or popular branch, became the prototype of our present house of representatives; the governor and council, acting in a legislative capacity, became the prototype of the modern state senate. With little or no real consideration of the relative merits of single-chambered and double-chambered legislative bodies, practically all of the states which have come into existence since the Revolution have adopted the bicameral plan. The utility of the bicameral legislature as an instrument of democratic government is, however, now being vigorously challenged, and the question will be discussed in some detail in a later chapter.[1]

6. A bicameral legislature

In every state there is an elaborate system of courts for the administration of justice in civil and criminal cases, and for administering the estates of deceased persons. Everywhere the highest

7. Civil and criminal courts

[1] See Chap. xxxv.

CHAP. XXXIII

of these state courts, usually called the supreme court, exercises the right to declare null and void any act passed by the legislature of the state or any ordinance passed by a city council which contravenes a provision of the state constitution, the national constitution, an act of Congress, or a treaty of the United States.

8. Separation of powers

Like the national government, all of our state governments are organized upon the theory that the powers of government fall into three great classes, executive, legislative and judicial; that each of these groups of powers should be assigned to, and exercised by, a single branch or department of the government; and that no department of government should exercise any of the powers which have been assigned to either of the other departments. The idea is, in other words, that executive, legislative, and judicial functions should, so far as possible, be confined in mutually exclusive compartments.

Hence it is that we find all of our state constitutions specifically recognizing the doctrine of separation of powers. The Illinois constitution of 1870, for example, declares that "the powers of the government of this state are divided into three distinct departments—the legislative, executive, and judicial; and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."[1] As might be inferred from the final clause of this article, it has not been found practicable in any of the states to make a strict application of the doctrine; by constitutional provision and by judicial construction, numerous specific exceptions to it have been made from time to time.

Unlike most of the other governmental features common to the several states, deliberate observance of the separation of powers first appeared in our political system in the period of the Revolution; and from the end of the eighteenth century to the opening years of the twentieth, the principle was almost universally acclaimed as the corner-stone of American democracy, as the chief reason for the success of our national government, and as an absolutely indispensable feature of all our state governments and of all our municipal governments as well. At the present time, however, both political scientists and men of long experience in the practical affairs of state and city administration are vigorously

[1] Art. III.

challenging the doctrine as a mere shibboleth;[1] and the adoption of the commission form of government in more than five hundred cities since 1900 attests the widespread belief today that separation of powers, while making for a certain negative kind of safety, is nevertheless unsound. The main reason why it is unsound, according to people who feel this way, is that it assumes that there are three primary or fundamental functions of government, whereas in fact there are only two, namely, the formulation of public policy by the legislative body and the execution of that policy by the executive and judicial branches. The theory is criticized, furthermore, for its failure to give due consideration to the natural and inevitable interdependence of departments of government and the necessity that they work in close coöperation.

9. Checks and balances

Intimately connected with the principle of separation of powers is the system of checks and balances, which is also found in every state government. Each of the three branches is provided with certain means of defense against encroachments upon its proper sphere by either of the other two branches. Thus the executive department may check legislative encroachment through the exercise of the veto power by the governor; the judiciary has a check upon the legislature through its power to declare the acts of that body unconstitutional; and in turn the legislature, through its power to impeach and remove both administrative and judicial officers, and in some instances abolish courts, has a check upon the executive and judicial departments. The right of the senate to confirm many of the governor's appointments is a farther check upon the executive; and the latter has a certain check upon the courts through its power of pardon and reprieve. Finally, each branch of the legislature is balanced against the other, each having a veto upon the legislative acts of the other.

10. Subdivisions for purposes of local government

Lastly, every state is divided into local government areas called counties, except in Louisiana, where the name parish is used instead. These counties or parishes, in turn, contain towns, or townships, villages, boroughs, cities, and a great variety of special districts. Thus it comes about that a vast majority of people live under at least four different governments, namely, the national government, a state government, a county government, and the government of one or more subdivisions of a county, such as a city,

[1] H. J. Ford, "The Cause of Political Corruption," *Scribner's Magazine*, XLIX, 54 (Jan., 1911).

township, village, or borough; and it is with one or another of these varied subdivisions of a county that the native-born citizen, consciously or unconsciously, first comes into contact.[1]

All of these local government areas (or political subdivisions, as they are called collectively) are created and endowed with powers by the state exclusively. Every state has complete authority to devise its own scheme of local government and may modify it at will from time to time; the national government has nothing to do with such matters. The inhabitants of all of these subdivisions enjoy more or less extensive rights of local self-government. None the less, the subdivisions are themselves creatures of the state constitution or state statutes, and, subject to a steadily increasing number of constitutional restrictions, the legislature may exercise almost unlimited authority over them, altering or abolishing their existing forms of government, and, if it chooses, depriving the inhabitants of practically all voice in their local affairs without consulting them. On the other hand, the legislature may grant them almost complete local self-government, or what is commonly called "home rule."

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(For other references see pp. 178-179.)

[1] The governments of these various local divisions will be described in Part V.

CHAPTER XXXIV

STATE CONSTITUTIONS

Every state has a written constitution which forms the legal basis of its government precisely as the constitution made at Philadelphia in 1787 forms the legal basis of the national government. Most of these forty-eight organic laws—even those in effect in the older states—date from comparatively recent times. But some of them have lasted through two or three generations, and a few are, to all intents and purposes, of Revolutionary origin. One of the signal contributions of the authors of American independence to political progress was, indeed, the drafting of written constitutions to serve as the basis for the new state governments.

The first constitutions

Beginning with New Hampshire, eight colonies—in process of becoming states—adopted their first constitutions in 1776; and three others joined the list in the following year.[1] Connecticut and Rhode Island made only a few formal changes in their corporate charters, which thereafter served as state constitutions until 1818 and 1842, respectively. The people of Massachusetts went along under a provisional government until 1780, when their first and only state constitution was adopted. This instrument alone of the original series was submitted to a popular vote. Furthermore, it alone was framed by a convention of delegates specially chosen for the purpose;[2] the others were made by legislatures or irregular revolutionary assemblages. Constitution-making by bodies brought into existence for that sole purpose, however, soon became the rule; and every state constitution in force to-day originated in this manner.

A state's power over its constitution

When, therefore, the national government was set up, first under the Articles of Confederation and later under the constitution of 1787, every state had a written constitution; and, although

[1] See p. 111. W. C. Morey, "The First State Constitutions," *Annals Amer. Acad. Polit. and Soc. Sci.*, IV, 201-232 (Sept., 1893); W. C. Webster, "Comparative Study of the State Constitutions of the American Revolution," *ibid.*, IX, 380-420 (May, 1897).

[2] W. F. Dodd, "The First State Constitutional Conventions, 1776-1783," *Amer. Polit. Sci. Rev.*, II, 545-561 (Nov., 1908).

CHAP. XXXIV

it is nowhere formally required, every one of the thirty-five states subsequently admitted came into the Union similarly equipped. Every state has, of course, the right to make and alter its own constitution. But this is not an absolute right. The state is a political division of undefined, yet limited, powers, and it can no more transcend the restrictions placed upon it by the national constitution in making or amending its fundamental law than in doing anything else. For example, it cannot, in its constitution, authorize ex post facto legislation or the use of bills of attainder. Before a state is admitted to the Union, Congress scrutinizes its proposed constitution, and if anything objectionable is found, admission may be held up until a change is made; although, as we have seen, a political requirement imposed in this way may, after the state is once admitted, be practically nullified.[1] Every state determines for itself how its constitution, once in force, may be amended or replaced with a new one.

Length of existing constitutions

Naturally, state constitutions vary considerably in contents, and therefore in length. But all of them are long documents; even the briefest ones run well beyond the national constitution in number of words, if not also in multiplication of provisions. The ten shortest instruments are those of New Hampshire (1792), Vermont (1793), Connecticut (1818), Rhode Island (1842), New Jersey (1844), Indiana (1851), Iowa (1857), Kansas ((1859), Tennessee (1870), and North Carolina (1876). These vary from fourteen closely printed pages in the case of New Jersey to nineteen pages in the case of New Hampshire. With only two exceptions, all were adopted before the Civil War. The ten longest constitutions are those of Maryland (1867), Missouri (1875), Colorado (1876), Georgia (1877), California (1879), South Dakota (1889), Alabama (1901), Virginia (1902), Oklahoma (1907), and Louisiana (1921). The shortest of this group is the constitution of South Dakota, which covers thirty-eight pages; the longest is that of Louisiana, which runs through almost ninety pages; the majority fill between forty and fifty pages. It will be noted that all were adopted since the Civil War, and four since 1900.

Reasons for increased length

As these facts indicate, state constitutions have steadily grown longer, the country over, in recent decades, and especially in the past fifteen or twenty years; new ones have been made exceptionally lengthy at the outset and older ones have been lengthened out by process of amendment. What has happened is that a large

[1] This happened in the case of Arizona in 1912. See p. 165.

number of subjects which formerly were either ignored or left to be dealt with by the legislature at its discretion have been incorporated in the constitution, sometimes occupying several paragraphs or even articles. Thus we now have elaborate provisions for the control of railways, banks, and other corporations; sections authorizing the enactment of workingmen's compensation and other laws for the benefit of the wage-earning classes; articles making detailed provision for popular education; provisions prompted by the changed position of women in modern society; and paragraphs dealing with the special problems created by the rise of great cities.

No one needs to be told that by nature these are matters for legislative rather than constitutional regulation. Why have they been brought into the constitutions at all? The first reason is to be found in a desire to overcome, or to obviate, the effects of judicial decisions in the realm of social and industrial regulation. For example, a decision of the New York court of appeals in 1911 declaring a workingmen's compensation law unconstitutional led shortly to the adoption in that state of a constitutional amendment definitely conferring power on the legislature to enact such a law. Similar decisions holding invalid some exercise of power by the legislature or by other branches of the state government have resulted in amplification in many states. In the second place, additions have been made with a view to authorizing the legislature or the executive departments to do certain things—perhaps to engage in non-governmental activities—for which there seemed to be no clear basis in the existing constitution. In the third place, there has been a marked tendency on the part of constitutional conventions to incorporate in the constitutions prepared by them bodies of regulations which have already been in successful operation in their states on a legislative basis. Thus in the Illinois constitution of 1848 were incorporated the detailed provisions relating to the organization of the inferior state courts which had been enacted by the legislature under the previous constitution. Furthermore, the more elaborate and detailed a constitution grows, the more frequently do new amendments become necessary; every new condition or unforeseen contingency tends to require a change, not simply statutory, but also constitutional.

Distrust of legislatures

But the main explanation of our lengthy constitutions is yet to be mentioned, namely, the widespread distrust of state legislatures growing out of the abuses of legislative power, accompanied

CHAP. XXXIV

by much corruption, which marked the middle portion of the past century. With a view to averting these evils, later constitution-makers have drawn up long lists of specific restrictions upon the action of the legislature [1] and, by the detailed treatment of many subjects in the constitution itself, have placed these matters beyond the reach of tinkering legislators. Confronted with the very practical problems of checking and preventing legislative abuses and corruption, constitution-framers have shown scant regard for the theoretical distinction between legislative and constitutional subjects and functions; and they will probably continue to do so until they have the courage to inaugurate such a reorganization of the state legislatures as will render constitutional restrictions largely unnecessary. Legislative reorganization, in other words, is a prerequisite in most states to a shorter constitution dealing only with fundamentals.

Why shorter constitutions are desirable

Simplifying the state constitution by eliminating all but fundamental provisions relating to the organization and powers of government and the rights of citizens is not a matter of mere academic interest; it is a reform of great practical importance, and for at least three reasons. In the first place, inserting legislative matters in the constitution is a good deal like locking up one's last will and testament in a safe-deposit box and throwing away the key. It is a most effective means of preventing reconsideration, change, and reform. To the ordinary delays and difficulties of obtaining legislative action is added the necessity of securing a constitutional amendment, seldom an easy thing to do. In the second place, the mounting number of subjects placed beyond the reach of the legislature has been in no small measure responsible for the rapid increase of judicial decisions holding state laws unconstitutional. Much of the criticism of our state courts would disappear with the adoption of shorter constitutions. Finally, from the expanded state constitution the courts have developed what is called the doctrine of implied or resulting limitations, which still farther ties the hands of the legislature on many occasions when action is desired. According to this judicial doctrine, the mere fact that a subject has been placed in the constitution indicates an intention on the part of the constitution-makers to take that subject entirely out of the hands of the legislature, and therefore is an implied denial of the right of the legislature to deal with any phases of that subject

[1] These are more fully discussed in Chap. XXXVI.

unless there is some express authorization in the constitution itself. It should be added, however, that this doctrine does not obtain everywhere; in some states the courts have held that the legislature has all power not denied to it by the constitution.

Contents of constitutions

State constitutions naturally deal with a great number of subjects. First of all, there is an outline of the general frame of government, with provision usually for the three familiar branches and always for the principal organs or agencies through which the state's authority is to be exercised. More extended provisions distribute power among these organs or agencies, and also between the state authorities, on the one hand, and local governmental units, such as counties and cities, on the other. Various leading activities, *e.g.*, taxation and finance, the regulation of banking, control of railroads and other public utilities, education, and different phases of industrial regulation, are likely to be dealt with in separate articles. There is usually, too, an article on suffrage and elections which, in addition to protecting the citizen from arrest and from military duty on election day, fixes the general and special qualifications for voting, and in a very general way regulates the conduct of elections. Another article stipulates the way or ways in which amendments may be proposed and adopted.

The bill of rights

Finally, there is commonly an important, and often rather lengthy, article comprising a bill of rights. In the older constitutions this is apt to include a statement of political theories which were in vogue in the late eighteenth and early nineteenth centuries —theories which in some instances are still generally adhered to but which in other cases have been relegated to the lumber-room of discarded doctrines. The newer constitutions either omit these theories altogether or present them in a revised, modernized form. More important, in any event, are the provisions relating to certain concrete fundamental rights of the citizen, such as religious freedom and freedom of speech and the press, the right to keep and bear arms and to be exempt from unlawful searches and seizures, the privilege of the writ of habeas corpus, and the right to bail and to trial by jury; also the clauses which prohibit ex post facto laws, laws impairing the obligation of contracts, cruel and unusual punishments, and the deprivation of life, liberty, or property without due process of law. Many of these stipulations merely duplicate, of course, the limitations imposed upon the national government by the first eight amendments to the federal constitution, and

CHAP. XXXIV

likewise those imposed upon the states in Article I, Section 10, of that instrument.[1]

Important modifications of these ancient rights—especially the right of trial by jury and of indictment by grand jury—have been introduced in some of the more recent constitutions, notably that of Oklahoma; and new clauses have been inserted dealing with problems arising out of the remarkable growth of business corporations. Indeed, in view of the restrictions on the states contained in the first article of the national constitution and in that clause of the Fourteenth Amendment which prohibits the states from depriving any person of life, liberty, or property without due process of law, various provisions of the state bills of rights have become superfluous; and their retention often results in conflicting decisions of state and federal courts when interpreting duplicated clauses in the state and national constitutions. The state constitutions might well, therefore, be shortened by the excision of such clauses. It is difficult, however, to imagine a constitutional convention with the boldness and originality to propose the omission of any of the venerable guarantees; and they rarely fail to reappear in full array when a constitution is revised.

Three methods of amending constitutions:

The alteration of a state constitution is everywhere a more difficult and roundabout process than the alteration or repeal of a statute. At the present time there are three principal methods of amending state constitutions, at least two being found in operation in the great majority of states.[2] These are (1) amendment by popular initiative, (2) amendment by legislative proposal, and (3) amendment by the action of a constitutional convention. Amendments proposed in either of the first two ways must, in every state except Delaware, be ratified by the voters before becoming effective; and the same is almost universally true of amendments originating in constitutional conventions, although in some instances popular ratification is not required.

1. By the popular initiative

Under the popular initiative, any individual or group of citizens may draft a proposed amendment and, by securing the signatures of a certain number of qualified voters to a petition, bring about its submission to a popular vote. If the proposal receives

[1] P. 189 above. See *Ill. Const. Conv. Bull.*, No. 15 (1920), "The Bill of Rights."

[2] For additional details concerning the different methods of amending constitutions, see *Ill. Const. Conv. Bull.*, No. 1 (1920), "The Amending Article"; and J. W. Garner, "The Amendment of State Constitutions," *Amer. Polit. Sci. Rev.*, I, 213-247 (Feb., 1907).

CONSTITUTIONAL AMENDMENTS

The Initiative and Referendum Amendment provides two methods for amending the constitution of Massachusetts:

1. By Initiative Petition; an amendment so proposed is designated an Initiative Amendment or an alternative therefor proposed by a member of either house and designated a Legislative Substitute.

2. An amendment proposed by a member of either house and designated a Legislative Amendment.

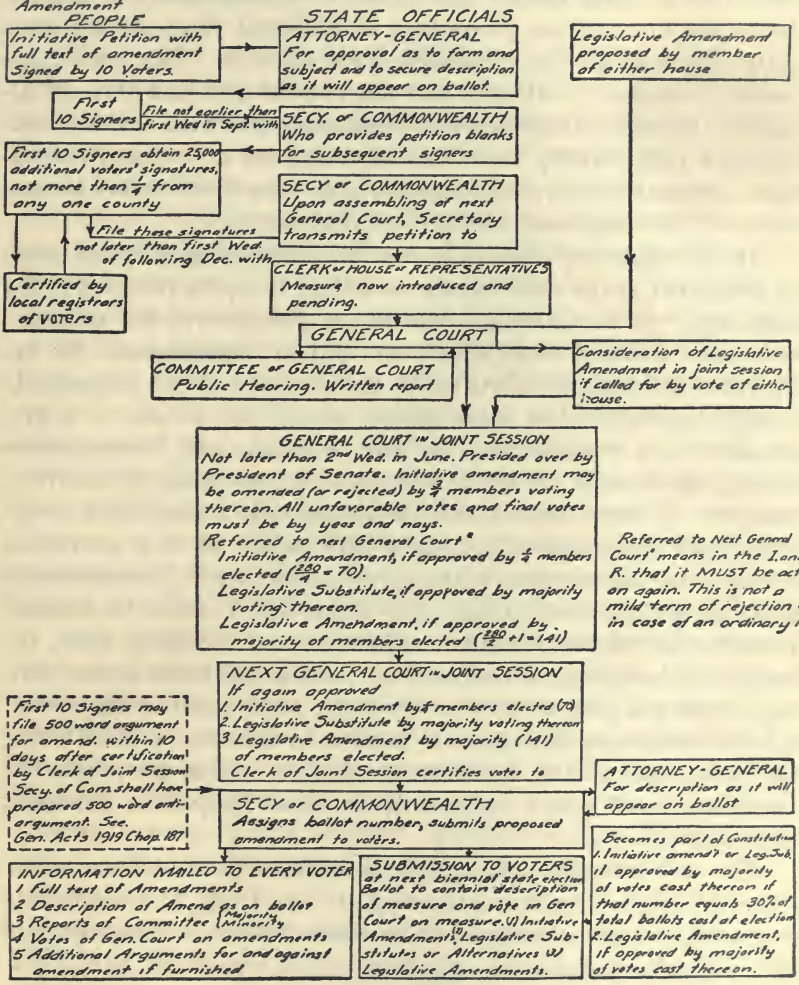

CHART SHOWING OPERATION OF INITIATIVE FOR CONSTITUTIONAL AMENDMENTS IN MASSACHUSETTS. (COURTESY OF MRS. L. J. JOHNSON.)

CHAP. XXXIV

the number of votes required by the constitution, it is adopted and becomes, to all intents and purposes, as binding as if it had formed a part of the original instrument. The use of the popular initiative in connection with constitutional amendments began in Oregon in 1902 and is now authorized in thirteen other states, the latest adoption being in Massachusetts in 1917.[1] To make an initiative effective, there must be either a definite number of signatures, as 10,000 in North Dakota and 25,000 in Massachusetts, or a number equal to a certain percentage of the total vote cast for some state officer at the last preceding state election. This percentage varies from eight in Oregon and ten in Michigan and Ohio to fifteen in Arizona, Oklahoma, and Nebraska; and with a view to insuring a fairly widely distributed demand for a proposed amendment, Missouri requires the signatures to come from voters in two-thirds of the congressional districts of the state.

(a) Procedure

(b) Limitations

In Michigan and Massachusetts the proposed amendment must be submitted to the state legislature before it can be referred to the electorate. If the Michigan legislature disapproves the proposal, it is not submitted to popular vote; and in Massachusetts the approval of at least one-fourth of all the members of two successively elected legislatures, in joint session of the two houses, is a prerequisite to a referendum. In both Michigan and Massachusetts the legislature may submit to the voters a competing or substitute measure. In most states where the initiative is authorized for constitutional amendments proposals may relate to any provisions found in the constitution, without restriction; but in Massachusetts there are several constitutional provisions which cannot be changed through the popular initiative. Down to and including 1919, the number of amendments proposed by popular initiative in the various states was 160, of which fifty-eight, or approximately thirty-six per cent, were subsequently ratified by popular vote. During the same period, the legislatures of these states proposed 185 amendments, of which eighty-one, or about forty-three per cent, were ratified.

(c) Size of popular vote required

For the adoption of popularly initiated amendments, some states lay down requirements which do not apply to amendments originating in other ways in those states. Thus in Massachusetts and Nebraska an initiated amendment must receive not only a ma-

[1] The initiative for constitutional amendments is now authorized in Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon.

jority of all the votes cast thereon, but also thirty and thirty-five per cent, respectively, of the vote cast at the election. In Michigan the favorable vote must be, not only a majority of the votes registered on the question, but not less than one-third of the highest number of votes cast at the same election for any officer. In Arkansas and Mississippi, on the other hand, an amendment initiated by popular petition may be adopted by a simple majority, whereas a higher vote is required for the adoption of amendments submitted by the legislature.

2. By legislative proposal

Much older and more generally found than the popular initiative is the method of amending by legislative proposal, which is authorized in every state except New Hampshire.[1] In about one-fourth of the states, including Indiana, Massachusetts, New York, and Pennsylvania, proposed amendments must be passed by two successive legislatures; and in Delaware this completes the amending process. In South Carolina and Mississippi an amendment proposed by the legislature is voted on directly by the people, but the power to take final action is vested in the next succeeding legislature. In a majority of states a proposed amendment must receive a two-thirds or a three-fifths vote of all members elected to each house, only nine states permitting a bare majority vote. There are other restrictions in some states which, alone or in combination with those just mentioned, make it almost impossible to amend the constitution without calling a convention; and it was largely because of these difficulties that the advocates of woman suffrage concentrated their efforts upon securing an amendment to the national constitution instead of waiting for separate state action.

Limitations

Limitations as to the number, the frequency, and the character of amending proposals are found in Illinois, Indiana, Pennsylvania, and eight other states. In Illinois, for example, the same legislature may not propose amendments to more than one article of the constitution, and in any case amendments to the same article may not be proposed oftener than once in four years; while New Jersey, Tennessee, and Vermont[2] permit the submission of amendments only once in five, six, and ten years, respectively.

[1] In that state all amendments must originate in a constitutional convention.

[2] In Vermont it is customary to appoint a commission to assist the legislature in preparing amendments to be submitted to popular vote. Such a commission was also authorized in Pennsylvania in 1919. See *Nat. Mun. Rev.*, X, 151-155 (Mar., 1921); W. D. Lewis, "Constitutional Revision in Pennsylvania," *Amer. Polit. Sci. Rev.*, XV, 558-565 (Nov., 1921).

CHAP. XXXIV

Other obstacles to the adoption of amendments are to be found in the requirements concerning the size of the popular vote requisite for ratification. In most states an affirmative majority of all votes cast on the proposal is sufficient; but in twelve states, including Illinois, Indiana, and Minnesota, a larger vote is necessary. At least ten states require that a measure shall receive a majority of all votes cast at the election in which it is submitted. Inasmuch as fewer votes are generally cast for amendments than for the candidates voted for at the same election, this requirement "in effect provides that all abstinence from voting shall be treated as negative voting, and it has often proved impossible to obtain, even upon important questions, an affirmative majority of the total vote cast in the general election." For this reason, four out of the eleven amendments submitted by the Illinois legislature since 1870 have failed of adoption, although all but one of them received a greater affirmative than negative vote. The last instance of this kind occurred in 1916, when an amendment authorizing some modification of the uniform general property tax received 656,298 affirmative votes and only 295,782 negative votes, but nevertheless failed of adoption because the affirmative vote was less than a majority of 1,343,381, the vote cast at this election for presidential electors. In some states this difficulty may be avoided by submitting amendments at special elections when no officers are to be chosen, in which case a majority of those voting on any particular amendment is substantially equivalent to a majority of those voting at the election. Rhode Island and New Hampshire require that proposed amendments be approved by a three-fifths and two-thirds vote, respectively, of the electors voting thereon; while in Indiana amendments must be approved by a majority of the electors of the state, whether voting or not.

Number of amendments submitted

Many other states formerly had restrictions upon the amending process similar to those just mentioned. But there has been a very general tendency in the past two or three decades to do away with these obstacles and to make the adoption of amendments easier, the most conspicuous illustration being the setting up in some states, as we have noted, of the popular initiative as an alternative to legislative action. Partly as a result of these changes, more than fifteen hundred amendments have been proposed and submitted to popular vote since 1900, under one or the other of the two general methods described. Of these, slightly more than nine hundred

were adopted before 1920, and six hundred were rejected.[1] The states showing the greatest activity were California with a total of 150 amendments submitted, Louisiana with 134, Oregon with 88, Ohio with 71, and Colorado, Georgia, New Jersey, South Dakota, and Michigan each with fifty or more.

3. By constitutional conventions

When only a few specific amendments are to be considered and quick results are desired, the methods of popular initiative and legislative proposal are preferable to any others. But when a thoroughgoing revision is contemplated they are hardly adequate.[2] This can best be undertaken by a constitutional convention, consisting of delegates specially chosen by the voters for the purpose. A convention, however, is a cumbersome and expensive method, and one not calculated to bring about immediate changes, however urgent they may be; indeed in some states a constitutional convention cannot be authorized, elected, and assembled and its work submitted to the voters in much less than three or four years. In New Hampshire the constitutional convention is the only authorized method of proposing amendments, but in all other states except Rhode Island it is an alternative method. It is expressly or impliedly authorized by the constitutions of three-fourths of the states; and in the remaining twelve (except Rhode Island)[3] it is the generally accepted view that the legislature may legally provide for the meeting of a convention, notwithstanding that the constitution is silent on the subject. As a matter of fact, conventions have been assembled in all of these states, including Pennsylvania and Massachusetts.

(a) Calling conventions

In Maine and Georgia the legislature is given full power to call a convention without waiting for any popular mandate on the subject; but in the great majority of states the question whether a convention shall be called is first submitted to popular vote, although the constitution may not expressly require it. The periodical submission of this question is required in seven states, namely, New Hampshire, every seven years; Iowa, every ten years; Michigan,

[1] At the November elections in 1920, 163 amendments were voted on in thirty-two different states, and at least 63 were adopted. See *Nat. Mun. Rev.*, X, 235 ff. (Apr., 1921).

[2] In Connecticut in 1907 and in Indiana in 1911 a complete legislative revision of the constitution was submitted to popular vote and in both instances rejected. See J. P. Dunn, "The Proposed Legislative Constitution of Indiana," *Amer. Polit. Sci. Assoc. Proceedings*, VII, 43-52 (1911).

[3] Because the Rhode Island constitution makes no provision for a constitutional convention, the supreme court of that state has held that there is no legal way by which such a convention can be held.

every sixteen years; and Maryland, New York, Ohio, and Oklahoma, every twenty years. In all of these states except Maryland and New Hampshire the question may also be submitted at other times. Where the popular initiative exists, it is not always clear that the question of calling a convention may be brought to a vote independently of any legislative action, but such procedure seems to be authorized in Arizona, Michigan, Maine, Oregon, Missouri, and Oklahoma.

The size of the popular vote required to authorize a constitutional convention varies. In eighteen states, including New York and Ohio, a majority of those voting on the proposition is sufficient, except in Kentucky, where the majority must also equal one-fourth of the votes cast at the preceding election; fourteen states, including Illinois, Minnesota, and Nebraska, require approval by a majority of those voting at a general election, as in the case of constitutional amendments; and Michigan requires a majority vote of the electors qualified to vote for members of the legislature. In all, about 216 constitutional conventions have been held, the most recent being those in Ohio (1912), New York (1915), Massachusetts (1917-19), Arkansas (1918), Nebraska, New Hampshire, and Illinois (1920), and Louisiana (1921).[1]

When a constitutional convention is authorized by a popular vote, detailed provisions usually have to be made by legislation for the nomination, election, convening, and compensation of the members, and for the submission of their work to the voters. Constitutions vary greatly in the extent to which they go into these matters. Almost all of them make provision for the apportionment of delegates, but in eight states all other details are left entirely to the legislature. On the other hand, in three states (New York, Michigan, and Missouri) the constitution itself contains detailed provisions on all of these points, so that the convention assembles as a matter of course after being authorized and elected, without the necessity of any legislative action. In most states the constitution contains a few provisions with respect to the time and method of

[1] Brief summaries of the work of some of these recent conventions may be found in the following articles: R. E. Cushman, "Voting Organic Laws in Ohio," *Polit. Sci. Quar.*, XXVIII, 207-299 (June, 1913); S. G. Benjamin, "The Attempted Revision of the State Constitution of New York," *Amer. Polit. Sci. Rev.*, X, 20-43 (Feb., 1916); L. B. Evans, "The Constitutional Convention of Massachusetts," *ibid.*, XV, 214-232 (May, 1921); A. E. Sheldon, "The Nebraska Constitutional Convention of 1919-1920," *ibid.*, XV, 391-400 (Aug., 1921); L. D. White, "The Tenth New Hampshire Convention," *ibid.*, XV, 400-403 (Aug., 1921); C. A. Berdahl, "The Louisiana Constitutional Convention," *Amer. Polit. Sci. Rev.*, XV, 565-568 (Nov., 1921).

electing delegates, and perhaps some other points, but leaves the details to be provided for by legislation.[1]

(b) Size

Constitutional conventions sometimes contain as few as eighty members and sometimes as many as four hundred; in most instances they do not exceed two hundred. The delegates are nominated and elected in accordance with the general primary and election laws, although some states, for example Massachusetts, have made special provision for non-partisan nomination and election. They are usually chosen from the legislative or senatorial districts employed in electing members of the legislature, and not infrequently a few are elected from the state at large. The Illinois convention of 1920 consisted merely of two delegates from each of the fifty-one senatorial districts of the state; the New York convention of 1915 consisted of three delegates from each senatorial district and fifteen elected at large; the Massachusetts convention of 1917 had from one to three delegates from each legislative district, four additional delegates from each of the sixteen congressional districts, and sixteen elected at large—a total of three hundred and twenty.

(c) Organization

The convention assembles at the state capital on the day designated by law, and organizes by electing one of its members president, providing for a staff of clerks, secretaries, and stenographers, and adopting a set of rules to govern its proceedings. A large body is ill-adapted to the detailed consideration of the great variety of subjects which always come before a constitutional convention, and therefore a somewhat elaborate committee system is employed. The committees are commonly appointed by the president of the convention, although in a few instances committee assignments have been made by a committee specially appointed for that purpose. The number and size of committees naturally vary: in the New York convention of 1915 there were thirty; in the Virginia convention of 1901-02, sixteen; in the Ohio convention of 1912, twenty-five; in the Massachusetts convention of 1917, twenty-four; and in the Illinois convention of 1920, twenty-five. In size, the committees vary from about three members on the less important ones to about twenty on the most important, the average in the recent conventions of Ohio, New York, Massachusetts, and Illinois being approximately fifteen.

To each committee is customarily assigned one or more sections

[1] In 1921 the Iowa legislature refused to carry out the popular vote of the preceding November which had been favorable to the calling of a constitutional convention. See *Nat. Mun. Rev.*, X, 315-316 (June, 1921).

CHAP. XXXIV

(d) Procedure

or articles of the constitution, and all proposals originating either with members of the convention or with people outside are referred to the appropriate committee for preliminary consideration. Committee sessions are often thrown open to the public, and an opportunity is almost always given the advocates and opponents of various changes to present their respective arguments. If the committee approves a given proposal, it is reported to the convention, with or without modification, and is placed on the calendar for consideration in committee of the whole. In general, the proceedings of a constitutional convention and its committees follow the same course as the proceedings of a state legislature.

(e) Three theories as to the authority of a convention

Indeed, constitutional conventions are legislative bodies whose primary, if not sole, function is to draft a new fundamental law for the state or to formulate amendments to the existing constitution. Some conventions, like that in Illinois in 1862,[1] have gone farther than this and have assumed more or less actual management of the state government, displacing existing officers, substituting others chosen by the convention, and attempting to supersede the legislature in various matters. At other times the legislature, in making provision for the meeting of a convention, has attempted to impose limitations upon its work which the convention has wholly or in part disregarded. Naturally, conflicts have resulted as to the proper scope of authority; and out of them three theories have developed.[2] According to the first, the legislature is supreme and in the act of calling the convention may limit the powers of that body by excluding from its consideration amendments to certain sections of the constitution, by requiring it to submit amendments to certain other sections, by prescribing the manner in which the work of the convention shall be submitted to popular vote, and in various other ways. Those who take this view hold that the convention has no right to disregard or to deviate from any of these statutory restrictions. According to the second theory, the convention is possessed of all sovereign powers of the people, and is the supreme body in the state during its existence, being therefore superior to the legislature or any other branch of the state government. It may disregard any or all limitations which the legislature

[1] On the history of this interesting body see O. M. Dickerson, "The Illinois Constitutional Convention of 1862," in *Univ. of Ill. Studies,* I (1905); and *Ill. Const. Conv. Bull.,* No. 1 (1920), "Constitutional Conventions in Illinois," 18-21.

[2] A good short discussion of these theories is to be found in Holcombe, *State Government in the United States,* 123-128, and McLaughlin and Hart, *Cyclopedia of American Government,* I, 424 ff.

tries to impose upon its activity, and may, indeed, legally exercise whatever governmental functions it cares to assume.

Each of these two theories has some support in convention precedents and judicial opinion. But the view now most generally held is that a convention is neither sovereign nor wholly subject to the legislature—that, on the contrary, the two are coördinate bodies, each supreme within its proper sphere and bound by the provisions of the existing constitution and statutes. If the constitution authorizes the legislature to impose restrictions on the convention, this body is bound to respect such limitations; on the other hand, the legislature, in the lack of definite constitutional sanction, cannot bind the convention as to what shall be placed in the revised constitution or lay other restrictions upon it. The convention, furthermore, may neither supersede any existing organs or agents of state government nor exercise any of the powers assigned to them; its functions are limited to proposing a new constitution or amendments to the existing constitution.

(*t*) Submission of the work of a convention

Almost invariably the results of a convention's deliberations have to be submitted to the voters for their approval before going into effect; although in a dozen or more instances in the past hundred years constitutions went into operation without popular ratification, the latest being the Virginia constitution of 1902 and the Louisiana constitutions of 1913 and 1921. The vote required for the ratification of the work of a convention is the same as that required for the adoption of amendments proposed by the legislature. A convention may submit its work to the voters in one of three different forms. It may present it as a series of specific amendments, to be voted on separately. This is practicable when only a comparatively small number of amendments are submitted, and was the course followed by the Massachusetts convention in 1917 and 1918, when three and nineteen amendments, respectively, were referred to the electorate. It was also the plan followed in Ohio in 1912, when forty-two proposals were submitted, and in Nebraska in 1920, when forty-one were submitted, although in these instances the numbers were quite properly regarded as excessively large for such procedure. In the second place, a convention may submit a complete new or revised constitution, to be accepted or rejected as a whole, as happened in Michigan in 1908 and in Arkansas in 1918. This method has the serious disadvantage of forcing noncontroversial changes to suffer the same fate as articles which relate to controversial subjects. The opposition to the initiative and

referendum or to changes in the system of taxation, for example, may be so strong that, rather than see them adopted, their opponents will vote against the entire document, although everything else in it is quite satisfactory. This is practically what happened in New York in 1915.

The third method is a compromise between the two plans just described. A complete revision of the constitution may be submitted as a single document to be rejected or approved generally, and at the same time one or more controversial sections may be submitted separately. This enables the electorate to approve the greater part of the convention's work and yet to disapprove certain specific features. Such a plan was followed in Illinois in 1870, when eight separate articles were submitted along with a new and substantially complete constitution, and in New York in 1915, when two proposals were separately submitted along with a liberally revised constitution.[1]

Nature of recent amendments

The great variety of subjects with which constitutional amendments of the past twenty years have dealt can be indicated in only the most general way. More proposals have had to do with taxation than with any other matter; 257 of this nature were submitted before 1920, of which 142 were adopted. Others related, in considerable but varying numbers, to prohibition, suffrage qualifications, labor legislation, control of corporations of one kind or another, municipal home-rule, indebtedness, ownership of utilities, direct primary laws, absent-voting, the initiative, referendum, and recall, simplification of the amending process, changing elective state offices into appointive ones, enlarging the veto power of the governor and his powers in other respects, extending the constitutional debt limit, authorizing the state to engage in non-governmental undertakings of a business nature, increasing the number of judges or the number of courts, and forbidding a law to be declared unconstitutional by the supreme court if more than one judge dissents.[2]

The future seems to promise two possible lines of state con-

[1] Some of the more recent conventions, notably the Michigan convention of 1908 and the Ohio convention of 1912, issued addresses in pamphlet form for circulation among the voters of the state, in which all the main features of their work were set forth, together with explanations of the various changes proposed.

[2] On recent constitutional amendments, see annual editions (to 1920) of the *American Year Book* (New York); *Amer. Polit. Sci. Rev.*, IX, 101-107 (Feb., 1915); X, 104-109 (Feb., 1916); XII, 268-270 (May, 1918); XIII, 429-477 (Aug., 1918); *Nat. Mun. Rev.*, X, 235-238 (Apr., 1921).

stitutional development. If the present tendency to incorporate in the constitution matters not of fundamental importance but primarily of a legislative character, and to deal with these matters in detail, continues unabated, more and more frequently will amendments become necessary in order to meet changed conditions. This will inevitably lead to the adoption of easier amending processes, *i.e.*, processes increasingly resembling those now employed in the enactment of ordinary statutes either by the legislature or by direct popular action through the initiative and referendum. In this way the historic dividing line between constitutional and statutory laws will become more and more hazy, if not quite indistinct; and we may ultimately arrive at substantially the same procedure for the enactment of both. On the other hand, we may see a reaction against the comprehensive and bulky constitutions of the past few decades in favor of shorter instruments dealing only with matters of a fundamental and truly constitutional nature. Should this come about—and there are some slight indications that it will—there will obviously be less need of frequent amendment, and the present sharp distinction between the modes of enacting constitutional provisions and ordinary statutes may be expected to continue to be reflected in more difficult amending procedure.

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CHAPTER XXXV

THE LEGISLATURE: STRUCTURE AND COMPOSITION

Essentials of a good law-making body

The legislature[1] is the main policy-determining organ of the state government. Its potentialities for good and for evil are unlimited, and every citizen ought to be solicitous that it be not unduly hampered by constitutional restrictions, and that it be of such outward structure and such internal organization as will render it an effective and responsible agency of the public will. Endowed with extensive powers to control for weal or woe almost all of the business and social relationships of citizens, as well as to regulate their civil rights and duties, the law-making body should manifestly be composed of persons who are at least reasonably representative of the principal geographical sections, and of the main social and economic groups, within the state. The members should be chosen on a basis, and in a manner, calculated to give all important elements a chance to be heard. Although highly desirable, it is not essential that they be experts in either the technique or the subject matter of legislation. It is, however, indispensable that they have the assistance of expert draftsmen, that they be in a position to avail themselves of expert advice concerning the complicated problems which come before them, and that they be able to draw freely upon the experience of other states and of all officials charged with the administration of the laws which they enact. Again, the legislature should not be of such size as to be unwieldy. Nor should its structure be such as needlessly to complicate the process of law-making, or to facilitate evading responsibility for what it enacts or fails to enact. Its internal organization, and the rules governing its proceedings, should be free from unnecessary complications, should seek to expedite work while yet giving each bill a fair opportunity to be considered, and should ensure full publicity for discussions, committee reports, and decisions. In the handling of financial legislation there should be very close coöpera-

[1] This is the term commonly employed; but it may be noted that in about half of the states the body is officially known as "the general assembly," in a few states as "the legislative assembly," and in Massachusetts and New Hampshire as "the general court."

CHAP. XXXV

tion between those agencies of the government which are charged with raising the state's revenue and those which are charged with appropriating and expending it.

Any one at all familiar with the organization and workings of our state legislatures knows that no one of the forty-eight fulfils all of the foregoing requirements, and that few attain to more than one or two of them. Many reasons can be assigned. For the present it will suffice to mention only the most fundamental one, which is the fact that hitherto the ingenuity of constitution-makers has been expended almost exclusively upon defining and restricting the legislature's powers, on the apparent assumption that the legislature is itself, at best, a necessary evil; with the result that little has been done toward working out plans by which the legislature can be made a really responsible law-making body for the affirmative enactment of state policies.

Bicameral structure

Every state legislature is organized in two houses, both elective,[1] and both endowed with substantially the same powers. In the original thirteen states the bicameral plan arose naturally out of the political ideas and usages of the Revolutionary period; and it was adopted in all of them except Pennsylvania and Georgia.[2] In the states later admitted to the Union, the plan was followed as a result of more or less conscious imitation of the older states, or of the national Congress, but with little of the justification which existed in the earlier cases; in part, it was perpetuated through unquestioning adherence to the ancient formula of divided powers and checks and balances. Originally there were higher property qualifications for membership in the state senate, and for the privilege of voting for senators, than in the case of the other branch of the legislature; so that the two houses were elected by different constituencies and represented somewhat different social and economic groups or interests. This distinction, however, long ago disappeared, and practically the only differences to-day between the two houses are the longer term for which senators are usually chosen,[3] the slightly higher age or residence qualifications

[1] Candidates for election to the legislature are nominated in some states, mainly in the South, by a convention, but in most states by direct primary. Election is by secret ballot (except where voting machines are employed); and the polling is in some cases on the same date as presidential and congressional elections, in other cases on different dates.

[2] Vermont also had a single-chambered legislature until 1836. See T. F. Moran, "Rise and Development of the Bicameral System in America," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XIII (Baltimore, 1895).

[3] In 31 states the term of senators is four years; in 16 states, two years; and in one state (New Jersey), three years. The term of members of the

for membership in the senate, and the fact that the terms of senators usually do not all expire at the same time as do the terms of members of the lower house. So far as determined by suffrage qualifications, the electorates for both houses are now identical. The idea that a bicameral legislature is necessary in order that different social and economic groups in the community may be represented is therefore tending, so far as the state governments are concerned, to become obsolete, and the retention of the plan has to be justified mainly on the ground that it provides representation for distinct geographic areas in one branch and for units of population in the other, or that it is effective as a means of preventing undesirable legislation by insuring, presumably, a double consideration for all laws prior to their enactment.

Is the retention of the bicameral system justified?

The first of these possible justifications has not commended itself to any considerable number of our states; in only a very small group, as we shall see, is either house made up solely of representatives from geographical areas as such. The bicameral system undoubtedly facilitates the maintenance of a balance of power between city and country districts, and it finds support as a mode of protecting the rights of rural minorities. Defenders of the system are, however, more apt to lay stress upon the checking, or revising, function which the two-house plan supposedly involves. For entirely satisfactory conclusions on this point there is need of a thorough study, in a number of typical states, of the actual rejections and amendments by each house of measures originating in the other house. Unfortunately such studies have been made in only one or two states, notably in the case of the New York legislature of 1910.[1]

Working of the bicameral system in New York

Of 1,036 bills passed by the New York senate in the year mentioned, only 69 were rejected by the lower house, or assembly; and of 1,120 passed by the assembly, only 161 were rejected by the senate. In other words, the senate killed fourteen per cent of the assembly bills, and the assembly killed six per cent of the senate bills. But the veto of neither house was even approximately as

lower house is one year in two states (New Jersey and New York), four years in three (Alabama, Louisiana, Mississippi), and two years in all the rest. For tables showing the membership, terms, and frequency and limitations of sessions in the various states, see *Mass. Const. Conv. Bull.* No. 9 (1917), 7-8, and *Ill. Const. Conv. Bull.* No. 8 (1920), "The Legislative Department," 534.

[1] See D. L. Colvin, *The Bicameral Principle in the New York Legislature* (New York, 1913); J. D. Barnett, "The Bicameral System in State Legislatures," *Amer. Polit. Sci. Rev.*, IX, 449-466 (Aug., 1915); *Ill. Const. Conv. Bull.* No. 8 (1919) "The Legislative Department," 528-532.

CHAP. XXXV

effective as that wielded by the governor and by city authorities,[1] who killed 240 measures passed by both houses, or twenty-five per cent of the total number passed. Furthermore, appropriations were reduced thirteen times as much by the governor's veto as by the veto of the senate upon money bills originating in the assembly. It also appears that of the 967 bills which passed both houses, 505 passed the second house without any change whatever, and that 58 of them were afterwards recalled by the house in which they had originated; while 102 others were vetoed. Apparently, therefore, the bicameral legislature in New York failed, in 1910 at all events, to fulfil one of the chief functions for which it is often argued that a bifurcated legislature is essential. In Illinois the bicameral system seems to have been somewhat more effective as a revising agency. In the four legislatures meeting between 1907 and 1913 each house was more or less instrumental in defeating almost one out of five of the bills passed by the other house, whereas the executive veto was applied to only about ten per cent of bills passed by both houses during the same period. Nevertheless, with the governor everywhere, except in North Carolina, endowed with the veto power (a weapon which governors did not have under most of the early state constitutions), and with the power of the courts to declare laws unconstitutional fully developed and recognized, it would seem that the value of the bicameral system, as a means of setting up an additional hurdle over which legislative measures must pass before becoming laws, is hardly sufficient to warrant its retention, in the face of the positive evils which accompany, and in some instances are inseparable from, that system.[2]

Abandonment of the bicameral system in cities and in Canadian provinces

It is significant that many a city which started out with a bicameral council has long since abandoned it, because of the delays which it entailed, the friction which frequently arose between the two chambers, the increased expense involved, and the manifold opportunities afforded for chicanery and corruption. To-day only one of our ten largest cities retains the bicameral council. Yet in some of these cities the single-chambered council not only represents more people than many a state legislature represents, but also raises and appropriates more money and deals with important matters affecting the interests of more people than a considerable num-

[1] In relation to acts affecting special cities which, under the state constitution, can be accepted or rejected by the city concerned.

[2] It was accordingly omitted from the draft of a "Model State Constitution" prepared by the National Municipal League in 1919-1920; see *Nat. Mun. Rev.*, IX, 711-715 (Nov., 1920).

ber of our state legislatures put together. The same abandonment of the bicameral system has taken place in five of the Canadian provinces, and to-day seven of the nine provinces have single-chambered legislatures. In all the Swiss cantons having representative law-making bodies the legislature is unicameral, as is the national parliament in Bulgaria, Jugoslavia, and Norway. Altogether, on the eve of the World War, more than sixty provincial or national legislative bodies were organized on the single-chamber plan.[1]

Advantages of the unicameral legislature

The advantages of the unicameral system are unmistakable. In the first place, it enables public attention to focus promptly upon a narrow and well-defined area, and therefore permits of a real scrutiny of legislative proceedings while laws are being made, a thing which is practically impossible in the case of our present large two-chambered legislatures with their multitude of committees. In the second place, when there is but one chamber responsibility cannot be bandied back and forth between two houses, members of one house working with members of the other to defeat legislation, and putting it beyond the power of the public to fix the responsibility. In the Ohio legislature of 1919 a competent eye-witness observed that bills were passed in one house out of courtesy to one member or another, or for political reasons, with a reasonable certainty that they would be "put to sleep" in the other body. Opponents of certain bills declared quite openly that they cared little if the measures objected to were acted upon favorably in the house in which they were introduced, since they could be better attacked in the other house. The same witness adds: "Each house became, so far as legislation initiated by the other is concerned, either a mere formal ratifying body, or a pleasant and easy legislative death-bed, as per agreements made beforehand."[2] In this matter the Ohio legislature is not exceptional; the same practices appear in every state.

Agreements of the kind that have been mentioned are facilitated by the existence of a dual committee system in the great majority of states, each house having its full set of committees. This duplication furnishes abundant opportunities for shifty deals between two sets of committees and two sets of political

[1] It should also be borne in mind that when we proceed to enact our most fundamental organic law, the state constitution, we invariably employ, not a bicameral body, but the single-chambered constitutional convention.

[2] C. A. Dykstra, in *Civic Affairs*, August, 1919. See also J. W. Garner, "Legislative Organization and Representation," in *Ill. State Bar Association Proceedings* (1917), 376 ff.

leaders, which still farther serve to cloud issues and dissipate responsibility. The disappearance of the dual committee system (including the peculiarly irresponsible and autocratic conference committees) which would, of course, follow the abandonment of the bicameral system, would greatly simplify the legislative process and would eliminate much of the delay which nowadays blocks good as well as bad measures. Deadlocks and friction between the two houses would cease when two houses no longer existed, and the cost of supporting the legislature would be greatly diminished. At all events, better results would be obtained with the same expenditure if the membership of the legislature were reduced to not more than fifty and the members were paid salaries sufficient to compensate men of large caliber for the sacrifices which service in the legislature always entails for the successful professional or business man. Deliberation and reflection do not now characterize the work of the two-house legislature in any state; most acts are passed in the last ten days or two weeks of the session, and often amid the greatest confusion. A smaller body, with more direct responsibility resting upon each member, would tend to remedy this condition.

Movement for single-chambered legislatures

That the movement for the abandonment of the bicameral system in this country has passed beyond the stage of mere academic interest appears from the following facts. In messages to legislatures or in public addresses, the governors of Arizona, Washington, and Kansas, in 1913, recommended constitutional amendments for a one-house legislature.[1] Such amendments have actually been submitted to a popular vote in Oregon, Oklahoma, and Arizona; and although they failed in every case, the size of the vote in their favor is significant when one considers the deep-seated traditions, interests, and prejudices which are bound up with the bicameral system. In Oregon, in 1912, the proposed amendment received over 30,000 votes, although more than 71,000 were cast against it; in 1914, a similar proposal received 62,376 votes, when 123,429 were cast against it. In Oklahoma, in 1914, the amendment received 71,700 favorable votes, as against 94,600 in opposition. In Arizona, in 1916, it received 11,631 votes, to 22,286 in opposition.

Even state legislators themselves have begun to recognize the clumsiness, ineffectiveness, and other defects of the bicameral system; in Nebraska a joint legislative committee made a report recommending that in 1916 a constitutional amendment be sub-

[1] *Amer. Polit. Sci. Rev.*, IX, 316-317 (May, 1915).

mitted, under the popular initiative, providing for a legislature of one house. In the California legislature of 1914 a proposed constitutional amendment originating with the Commonwealth Club of San Francisco, and providing for a single legislative body of only forty members, passed the lower house by a vote of 37 to 30, and the senate by a vote of 19 to 15. This, however, lacked five votes of being a majority of the entire legislature, and therefore the proposal failed to be referred to the people. In other legislatures, including those of Michigan and Washington, and among many public officers, there have been increasing indications of a consciousness that the bicameral legislature has little or no place in a genuinely democratic and effective scheme of state government.

Size of the houses

Changes in the size, as well as in the structure, of most of our state legislatures would also contribute to their increased effectiveness, and would reduce the ease with which responsibility for legislative action or inaction may now be avoided. For purposes of deliberation, the senates are, in most of the states, more nearly of ideal size than are the lower houses. Senates range in membership from seventeen in Delaware, eighteen in Utah, and nineteen in Arizona, up to fifty-one in New York and Illinois and sixty-seven in Minnesota, the last-mentioned numbers being rather larger than is desirable. The lower houses, on the other hand, are generally so large as to be ill-adapted for purposes of general discussion, with the result that great power in determining both the form and the substance of legislation has perforce to be lodged in irresponsible committees. Arizona and Delaware have lower houses of suitable size for deliberation, consisting of thirty-five members in each case. At the other extreme stand Vermont, Connecticut, and New Hampshire with lower houses consisting of 247, 268, and 404 members, respectively. More than half of the states have lower houses of over one hundred members.

A prevalent misconception of representation

Our legislatures have been made needlessly large and unwieldy in an effort to give them a broadly representative basis, it being mistakenly supposed that there is a direct connection between the size of a body and its representative character. If the people are sufficiently represented in the lower branch of Congress under a system which gives but one representative to more than two hundred thousand inhabitants, it would seem that our state legislatures would not suffer in their representative character by a considerable reduction in size; municipal councils in commission-governed cities have been reduced to five, or even three, members, and yet

CHAP. XXXV

they are found to represent the voters very adequately. Even a single public official—the president, a governor, or a mayor—often more truly represents public opinion than Congress, a legislature, or a city council.

The size of the two houses is determined in different ways in different states. The constitution, however, usually lays down some general rule or principle to guide the legislature in apportioning representatives and senators among the various political subdivisions.[1] In fewer than a dozen states, including Illinois, the constitution fixes the exact number of members in each house, a plan which has the advantage of preventing an almost certain increase in the size of the legislature with every reapportionment, such as has taken place in the history of Congress. At the same time, this plan has the disadvantage of reducing periodically, both proportionally and absolutely, the representation from the slower-growing sections of the state if reapportionment acts are passed every five or ten years; or, if such acts are not passed at stated intervals, it has the effect of reducing proportionally the representation from the more rapidly growing communities in the state. But in most states the constitution fixes no numbers and the legislature may, within broad limits, make whatever arrangements it desires.

Legislatures are fairly representative of social and economic groups

Despite oft-expressed opinions to the contrary, our state legislatures are probably fairly representative of the different social and economic groups comprised in the states.[2] Every degree of education is found, and in some legislatures the proportion of members who have had a high school, college, or university education is at times considerably greater than that prevailing among the people generally. Almost every profession is represented, and almost every conceivable business activity, although lawyers and farmers usually outnumber the members of other vocations. "With the farmer sits the artisan, with the banker sits the union labor agitator, with the manufacturer sits the small shopkeeper, with the preacher sits the saloon-keeper, with the professional specialist sits the jack-of-all-trades."

The majority are men in the prime of life, between forty and

[1] The various constitutional provisions on this point are summarized and classified in *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 532 ff.

[2] An interesting study of the personnel of the legislatures of Ohio, Vermont, Indiana, and Missouri a few years ago is to be found in S. P. Orth, "Our State Legislatures," *Atlantic Monthly*, XCIV, 728-739 (Dec., 1904), reprinted in P. S. Reinsch, *Readings on American State Government*, 41-56.

sixty years of age; although now and then a young man barely a voter, or an octogenarian, appears. Every phase and degree of political experience is also represented: "those who have been only voters, those who make politics a business; those who are ardent partisans, and those who are politically torpid; the conservative and the demagogue—all are intermingled in these representative bodies. Even foreign-born citizens are well represented"[1] As much cannot be said, however, for the various currents of political opinion. This is due to the fact that everywhere except in Minnesota[2] the members of both branches of the legislature are nominated and elected under the same party names and forms as are employed in national politics, and almost universally by a plurality instead of a majority vote.[3] This last feature makes it very difficult for minor political groups to obtain representation

But not of various currents of political opinion

Representation in both houses is based on geographical divisions known as districts. These divisions are laid out differently in different states, but as a rule a more or less sincere effort is made to establish and maintain districts which will be substantially equal in population; and the laws of many states require the legislature to re-district the state after each decennial national census, or oftener. In Vermont and some other New England states, however, there is no attempt to apportion representation in any exact way according to the distribution of inhabitants. On the contrary, every Vermont town is entitled to send one member to the lower house, and no more; a town of fewer than one hundred inhabitants has precisely the same representation as a city of twenty thousand. Similar "rotten boroughs" exist in New Hampshire, Connecticut, and Rhode Island. In Connecticut four small towns having a combined population of fewer than 2,500 have the

Units of representation

[1] Orth, *op. cit.* The following table shows the occupational classification of the members of the Ohio legislature in 1919:

	House	Senate
Lawyers	33	7
Farmers	32	4
Merchants	7	1
Insurance men	6	2
Real estate men	4	2
Teachers	3	2
Physicians	3	..
Salesmen	3	..
Manufacturers	3	..
Newspaper men	..	4

[2] Members are here nominated and elected on non-partisan ballots.

[3] In Vermont an absolute majority of all votes cast is required to elect. This often results in prolonged balloting, extending through several days.

CHAP. XXIV

same number of representatives (eight) as New Haven, Bridgeport, Waterbury, and Hartford, with their combined population of about a half million.[1]

In about a third of the states, outside of New England, every county is entitled to one member of the lower house, regardless of differences of size; and this rule holds true for the senates also in Maryland, Montana, New Jersey, and South Carolina. Nearly everywhere else large counties are subdivided and small counties are grouped into districts of fairly equal population; and these divisions, under various names, such as senatorial, assembly, or legislative districts, are made the bases of representation in the legislature. In a few states, notably Illinois, Minnesota, and North Dakota, there is but one series of districts for the election of members of the two branches of the legislature, a plan which has the advantage of permitting the development of some fairly permanent community interests in legislative representation within particular areas.[2] But as a rule the senatorial districts are different from, and larger than, the assembly districts.

Gerrymandering

The laying out of these districts devolves upon the legislature, and it not infrequently happens that the dominant party therein indulges in the partisan practice of gerrymandering the state. That is to say, the districts are so marked out as to give the dominant party a fairly safe majority or plurality in as many districts as possible, while the voters of the chief minority party are crowded into as few districts as possible, where they will be in an overwhelming majority. This practice, of course, seriously impairs the representative character of the legislature, for it deprives minority parties in most districts of any direct representation in the body which formulates public policy for the entire state.[3]

In order to limit the discretion of legislatures in laying out legislative districts and compel them to make a more equitable division of the electorate, many states have adopted strict constitutional provisions controlling the apportionment of representatives. In Illinois, for example, a definite rule is laid down to the

[1] For additional facts about the New England system of representation, see C. L. Jones, "The Rotten Boroughs of New England," *No. Amer. Rev.*, CXCVII, 486-498 (Apr., 1913); H. E. Deming, "Town Rule in Connecticut," *Polit. Sci. Quar.*, IV, 401-432 (Sept., 1889); G. S. Ford, "Rural Domination of Cities in Connecticut," *Municipal Affairs*, VI, 220-233 (June, 1902).

[2] Further details may be found in *Ill. Const. Conv. Bull.* No. 1 (1920), "The Legislative Department"; and Holcombe, *State Government in the United States*, Chap. IX.

[3] C. O. Sauer, "Geography and the Gerrymander," *Amer. Polit. Sci. Rev.*, XII, 381-402 (Aug., 1918).

effect that the senatorial districts, which are the bases of representation in both houses, shall be formed of contiguous and compact territory, bounded by county lines, and shall contain as nearly as possible an equal number of inhabitants. In some states, notably Wisconsin, Michigan, and Indiana, the courts have been very strict in construing such constitutional limitations and have declared apportionment acts invalid which, in the opinion of the court, did not sufficiently comply with the constitutional requirements. On the other hand, the courts of New York, Illinois, and Kansas have been disinclined to invalidate apportionment acts unless the constitutional requirements appear to have been wholly disregarded.[1]

Discrimination against urban communities

Another undemocratic feature of apportionments of representation is the frequent discrimination in favor of rural counties against urban centers, especially in Illinois, Maryland, Missouri, New Jersey, New York, Pennsylvania, and Rhode Island. New York City has about fifty-four per cent of the total population of the state, but is allowed only forty-two per cent (63 out of a total of 150) of the seats in the assembly, or lower house; Providence and Baltimore, with almost forty and fifty per cent of the population of their respective states, elect only about one-fourth of the members of the lower house; and Cook county, including Chicago, with almost fifty per cent of the population of Illinois, would, on a strictly proportionate basis, be entitled to twelve more representatives in the lower house than it now has.

Reasons for such discrimination

In justification of these and similar discriminations one often hears it said that cities, being industrial centers, are hot-beds of radicalism, while conservatism is found chiefly in agricultural communities; and therefore, in order to check radicalism, the agricultural areas should be given greater proportional representation in the legislature. Besides, there is a prevalent feeling among practically all classes in the less thickly settled portions of the states that no one county or city should be able to control the legislature, a thing which might easily happen if all portions of the state were represented on a strict population basis. Naturally, this feeling has been capitalized by politicians from the rural districts, who, fearing the domination of the state political organization by the "city crowd," with consequent diminution of their own influence and prestige, seek to check in every possible way the granting of strictly proportioned representation to the urban centers. The

[1] P. S. Reinsch, *American Legislatures and Legislative Methods*, 200-213.

CHAP. XXXV

discrimination against cities in Delaware and Rhode Island goes far to explain the opposition in the legislatures of those states to all political changes designed to increase the power of the popular majority. For example, direct primaries are opposed in those states because the abandonment of the convention system of making nominations would mean the end of the control of such nominations by the rural districts. The initiative and referendum are similarly objected to because they would nullify rural control of the legislatures.[1]

Objections to it

On the other hand, it is argued that to deprive one section of the state of its proportionate representation in the legislature is to violate a fundamental principle of American democracy by substituting minority rule for majority rule; that the trend of American constitutional development from the colonial period to the present has been away from the territorial basis of representation to a population basis, and that such discriminations as remain are merely vestigial appendages; and that those who attempt to justify discriminations on the basis of a distinction between radicalism and conservatism either are ignorant of, or disregard, the fact that some of the most conspicuous of the radical movements in American history—the granger movement, greenbackism, populism, free-silverism, and the more recent Non-Partisan League movement—have had their origin and found their largest numbers of adherents in the distinctively agricultural sections of the country. As a matter of fact, neither the urban nor the rural sections of the country can justly be charged with being the exclusive habitat of either radicalism or conservatism. Moreover, it should be remembered that the radicalism of yesterday is the conservatism of to-morrow, and that to check unduly what is regarded by some people as radical to-day may prove a serious bar to the progress of the state in years to come.

Proportional representation:

It has been pointed out that our legislatures are farther defective in that not all currents of political opinion find representation in their membership. Both senators and representatives are chosen in small, single-member districts; and the candidate who obtains a simple plurality wins. This means that large minorities—even majorities, when the votes are divided among the candidates of three or more parties—are left with no spokesman in either house. A remedy for this condition would be some scheme of large electoral districts, each returning representatives of all considerable

[1] A. N. Holcombe, *State Government in the United States*, 247, note.

political elements in fair proportion to their voting strength. This principle of "proportional representation" has already been adopted in Switzerland, Belgium, Denmark, Sweden, Italy, several of the German states, some parts of the British self-governing dominions, and, in a qualified form, in France;[1] and it is receiving steadily increasing attention in the United States, where a few municipalities have brought it into operation.

1. The Hare system

As now practised, proportional representation takes two principal forms. One of them, called the Hare system—a combination of preferential voting and proportional representation—has been adopted for the election of members of the city council in Ashtabula and Cleveland (O.), Kalamazoo (Mich.), Boulder (Col.), Sacramento (Cal.), and a few Canadian cities.[2] The other plan is called the list system. If either were to be generally adopted for the election of members of the state legislatures, the present small single-member districts would give way to fewer large districts, each electing perhaps from five to ten representatives. Under the Hare system each voter would indicate on the ballot the order of his preference among the various candidates whose names appeared thereon. This mere preferential-voting arrangement is now in use in more than fifty cities in this country for the election of city officials. The proportional feature appears in the method of determining the result of the election, and it has not been so widely adopted. If employed, it would mean that after all of the ballots have been sorted according to the indicated first preferences, the total number of valid ballots would be divided by the number of seats to be filled plus one, and the quotient would become the electoral quota which each candidate must receive in order to be elected. Any candidates who were found to have received a num-

[1] F. A. Ogg, *The Governments of Europe* (rev. ed.), 421-422. The best books on proportional representation are J. R. Commons, *Proportional Representation* (2nd ed., New York, 1907), and J. H. Humphreys, *Proportional Representation* (London, 1911). The files of the *Proportional Representation Review*, the organ of the American Proportional Representation League, contain lucid expositions of the different forms which the system takes.

[2] Short articles describing the workings of the Hare system in American cities may be found in *Nat. Mun. Rev.*, V, 56-65 (Jan., 1916); V, 87-90 (Jan., 1917); VII, 27-35 (Jan., 1918); VII, 339-348 (July, 1918); IX, 9-12 (Jan., 1920); IX, 84-92 (Feb. 1920); IX, 408-410 (July, 1920); X, 411-413 (Aug., 1921). This system was also used in the city of Winnipeg for the election of ten members to the provincial parliament of Manitoba in 1920. Its operation in that election is described by O. E. McGillicuddy, *New Republic*, XXIII, 44-45 (Sept. 8, 1920), and by D. B. Harkness, *Nat. Mun. Rev.*, IX, 695-696 (Nov., 1920). In 1920 the Michigan supreme court declared the proportional representation feature of the Kalamazoo charter unconstitutional.

ber of votes equal to the electoral quota would be declared elected. If any of these candidates received votes in excess of the quota, those votes would be distributed among the remaining candidates in accordance with the second choices indicated on the surplus ballots. If, with these additions to his first-choice votes, any candidate should obtain a number equal to the quota, he would be declared elected, any surplus votes again being distributed among the remaining candidates in accordance with indicated second choices. If no one should receive the quota as a result of distributing the surplus votes, the candidate standing lowest would be eliminated, and his ballots distributed among the other candidates in accordance with indicated second choices. This process of distributing surplus votes and eliminating candidates with the smallest votes in successive countings would be continued until as many candidates obtained the required quota as there were places to be filled. If, however, a point should be reached where there were no more candidates left than there were seats to be filled, the surviving candidates would be declared elected, even though some of them fell short of the electoral quota.

2. The list system

The list system would undoubtedly appeal more strongly to practical politicians in our country, inasmuch as under it parties are enabled to play a larger rôle in determining the result of an election. Under this plan, which, with some variations, is now in operation in Belgium, France, Italy, and several other countries, each organized group of voters nominates a "ticket," or list of candidates, usually equal in number to the number of representatives to which the district is entitled. The number of seats obtained by each party is determined by the proportion which the number of votes cast for each party ticket bears to the total number of votes cast in the district. The order in which the names in each list appear on the ballot affects the result and is determined by the party managers; unless the voters indicate a different preference, that order is followed in the assignment of the seats to which each ticket is entitled. If, however, a ticket should be entitled to four representatives, and a candidate whose name stood sixth on the list as made up by the party leaders should receive more votes than one of the first four, he would be declared elected in place of the lowest candidate among the first four.

The actual operation of the list system may be illustrated by the following hypothetical case. Assume that a state has been divided into half a dozen large districts in each of which ten rep-

resentatives are to be elected; that five parties are competing for these seats; and that the total vote cast in the given district is 100,000. The first thing to do is to ascertain the electoral quota. This is done by dividing the total vote received by each ticket or list successively as follows:

	Republican	Democrat	Socialist	Farmer-Labor	Prohibitionist
Divide by 1....	30,000	25,000	20,000	15,000	10,000
Divide by 2....	15,000	12,500	10,000	7,500	5,000
Divide by 3....	10,000	8,333	6,666	5,000	3,333

Next, the ten highest quotients thus obtained are to be arranged in order, as follows:

30,000
25,000
20,000
15,000
15,000
12,500
10,000
10,000
10,000
8,333

The tenth quotient, 8,333, becomes the electoral quota, or the number of votes which each ticket must have in order to be entitled to one representative. Dividing the total vote cast for the Republican ticket by 8,333 gives three, the number of representatives to which that party is entitled; and the first three names on the Republican list would ordinarily be declared elected. Applying the same method to the votes cast for other party tickets, we obtain, as the final result, the election of three Republicans, three Democrats, two Socialists, one Farmer-Labor-man, and one Prohibitionist.

Each considerable group of voters in the district would thus receive representation in the law-making body much more nearly in proportion to its voting strength than under the plurality rule, which in this case would have given the entire delegation to the Republicans. Proportional representation unquestionably produces a legislative body which more truly reflects all the important currents of political opinion than does the small, single-member district, electing under the plurality rule; and it hardly requires argument that a body whose main business is the translation of public opinion into law ought to be of this broadly representative character.

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CHAPTER XXXVI

THE LEGISLATURE: POWERS AND LIMITATIONS

The legislature is the central power-house of the state governmental system

From the state legislature, as from a great power-house, emanates the energy which sets in motion and drives most of the machinery, not only of the state government, but of the county, municipal, and other local governments as well. The state constitution creates numerous executive and administrative offices and to some extent defines their functions; it establishes courts and to some extent fixes their jurisdiction; it provides for certain organs of county and local government and to some extent marks out their powers and duties. But the articles which relate to these several phases of state and local government are seldom self-executing; they usually require supplementary legislation. Administrative officials, for example, have little to do until the legislature enacts laws for them to administer; the courts cannot adjudicate the rights of individuals, save as these rights may be based upon the common law, until the legislature defines them; county, city, and other local government units are intimately dependent upon the legislature and cannot function until that body has enacted numerous necessary laws.

Laws are needed to make constitutional provisions effective

The legislature perfects the judicial and local organization of the state; regulates, wholly or in part, the jurisdiction and procedure of the various state and local courts; defines crimes and their punishment; determines, within certain limitations, the civil rights of citizens; regulates the ownership, use, and disposition of property, the making and enforcement of contracts, the conduct of professions and of many business and industrial enterprises, especially those carried on by corporations; enacts laws affecting the relations of husband and wife, and the other domestic relations; provides for a system of free public schools, together with charitable and penal institutions; regulates primaries, elections, and the organization and operations of political parties; exercises the "police power" by passing acts which restrict rights of liberty and property in the interest of public health, morals, safety, and general welfare; authorizes taxation for the support of state and local

CHAP. XXXVI

governments; appropriates definite sums to be expended by each department or activity of the state government; and authorizes the incurring of indebtedness by both state and local governments.[1]

No detailed enumeration of the powers of the legislature

This enumeration merely suggests the scope, variety, and importance of state legislative activities. Nevertheless, one may pore over one's state constitution from beginning to end without discovering any such list of legislative powers as that just given. For, unlike Congress, the state legislature possesses all legislative power not granted elsewhere or prohibited to the states by the national constitution, and not expressly or impliedly withheld by the state constitution; and no comprehensive enumeration of its powers is ever attempted. One will, of course, come across clauses in almost every constitution which expressly confer certain specific powers on the legislature; and these direct grants of authority are, as a rule, not merely superfluous. In many instances they have become necessary in order to offset the effect of court decisions in interpreting certain general phrases in the constitution, such as "due process of law;" and again they have been inserted as a precaution against a possible future judicial denial of power to the legislature in the matters with which they deal. Outside of cases of this kind, however, the powers of the legislature are not named; as part of the general powers of the state, they are residual and unenumerated.

Despite the fact that the legislature is an exceedingly important and useful organ in every state government, it is looked upon by people generally as more or less of a necessary evil, which needs to be curbed and checked at every possible point; and constitution-makers have themselves commonly shared this view. Admittedly the history of American state legislatures contains much to account for, if not to justify, the current notion that they are inefficient and untrustworthy bodies; and practically every constitution adopted since the early nineteenth century has testified, in the

[1] In addition to strictly legislative functions, certain non-legislative functions are assigned to the legislature in every state. For example, the consent of the senate is required for the appointment and removal of certain officers appointed by the governor; the judges of the highest state court, and sometimes of inferior courts, are chosen by the legislature in Vermont, Rhode Island, Virginia, and South Carolina; in about one-third of the states judges of the state courts may be removed by a vote of the two houses of the legislature; impeachment proceedings originate in one branch of the legislature and are generally tried by the other, although judges of some of the highest courts may be added, as in New York; in some states the legislature also appoints some of the county and town officers, and takes part in the appropriation of town and county funds; and in a number of states the legislature serves as a canvassing board in connection with the election of certain state officers.

number and variety of the restrictions imposed upon the legislature's activities, to the unfortunate experiences of the past. This, however, has only aggravated the former difficulties, or at all events raised up new ones in their stead. Many of the restrictions imposed have served their purpose, have outlived their usefulness, or are futile, either because of the ease with which they can be evaded or because they do not go to the root of the evils which they were designed to eradicate. For the sins of past generations of lawmakers, many unoffending legislatures are to-day so hobbled and shackled as not only to prevent them from doing serious harm, but also to make it impossible for them to accomplish the good which otherwise might result from their work.

Absence of restrictions on early legislatures

In the earliest state constitutions practically no limitations were placed upon legislative activity other than those contained in the bill of rights; on the other hand, those documents furnish abundant evidence of the high popular esteem in which the legislature was then held.[1] For example, in many states the legislature elected the governor, other important executive officers, and also the judges of the courts. Furthermore, in only three states (New York, Massachusetts, and South Carolina) was a veto upon legislation conferred upon the governor or some other authority. In the state constitutions of to-day these conditions are almost completely reversed everywhere outside of New England, where, with the exception of a few restrictions on financial powers and some general directions to provide for education and the militia, the legislatures retain almost all of their early freedom. In the newer constitutions, especially in the West and South, one finds, in addition to the provisions of the bill of rights guaranteeing fundamental personal and property rights against legislative impairment, an impressive array of specific limitations on legislative activity. A veto on legislation has also been given to the governor in every state except North Carolina; and in a few states the veto may be applied to a part, or to parts, as well as to the whole, of any legislative measure.

Later restrictions

Other limitations are to be found in constitutional provisions which specify the number, method of selection, duties, and powers of important state and county officers—provisions which sometimes go so far as to fix salaries and to prescribe the method of compensation and the length of the term of office. Such matters are there-

[1] All state legislatures have, of course, been restricted by certain provisions in the national constitution, notably those contained in Art. I, § 10.

CHAP. XXXVI

by placed almost entirely beyond the power of the legislature to change; whence it comes about that short-ballot reform is usually made totally impossible by legislative action alone. Similarly, the amplification of state constitutions by the inclusion of detailed provisions relating to large numbers of subjects over which the legislature at one time had jurisdiction removes those subjects, at least in part, from the sphere of legitimate legislative action; it so removes them altogether in those states in which the courts have most fully applied the doctrine of implied or resulting limitations.

Narrow judicial construction of restrictions

In some states this legal doctrine has also been applied to express grants of power to the legislature, thus still farther curtailing the activity of that body when no such effect had been contemplated or intended by the constitution-makers. Nebraska furnishes a conspicuous illustration of this sort of narrow constitutional interpretation. The Nebraska constitution of 1876 provides that the legislature shall have authority to establish reform schools for children *under sixteen years of age;* and the courts have construed this as restricting the legislature to the establishment of reform schools for such persons only, and as preventing it from establishing such schools for persons over the age mentioned. Many other state courts take the view that every provision of a state constitution should be construed as limiting legislative power to the greatest possible extent. The result in probably a majority of the states is that, whereas in theory the legislature has all legislative power not denied to it by the terms of the national and state constitutions, in practice it has tended to become merely a body of strictly delegated powers, much like the municipal council described in a later chapter.[1] Few factors have contributed more to deaden popular interest in the work of the legislature and to deprive the state of the services of its best qualified citizens than this shrivelling of legislative power through express constitutional restrictions, reinforced by narrow judicial canons of interpretation.[2] This tendency on the part of the courts might to some extent be checked, remedied, or counteracted by formulating in the constitution itself

[1] See Chap. XLVI.

[2] For an excellent discussion of the powers of the state legislature as affected by judicial canons of construction, see *Ill. Const. Conv. Bull.* No. 8 (1920), "The Legislative Department," 578-587; E. Freund, "The Problem of Adequate Legislative Power under State Constitutions," *Acad. of Polit. Sci. Proceedings,* V, 98-126 (1914); W. F. Dodd, "The Functions of a State Constitution," *Polit. Sci. Quar.,* XXX, 201-221 (July, 1915).

a new rule of judicial construction which would at least make it easier for judges to adopt a more liberal view of legislative powers. The Oklahoma constitution of 1907, in point of fact, does seek to prevent the drawing of implied limitations from provisions not intended as such, by declaring that "the authority of the legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this constitution upon any subject whatsoever shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."[1]

Other principal restrictions.

Most other constitutional limitations on the legislature relate to (1) financial powers, (2) the enactment of special, local, or private laws, (3) legislative procedure and the form in which bills must be enacted, (4) the frequency and length of legislative sessions, and (5) the use of the initiative and referendum.

1. financial powers

Among financial limitations, one finds sections requiring all taxation to be uniform upon all kinds of real and personal property according to valuation, or permitting classification of different kinds of property and requiring that the rate of taxation shall be uniform within each class; clauses forbidding the legislature to exempt counties, or other local governments, from their share of the state taxes, or to exempt persons or corporations from taxation; clauses prohibiting the appropriation of money in any private law, and excluding all other subjects from bills appropriating money for the payment of members and employees of the legislature and the salaries of state officers; sections limiting the period for which appropriations may be made, and prohibiting extra compensation to any public officer, agent, or contractor, or the payment of any claim against the state not expressly authorized by law. All but three states (Connecticut, New Hampshire, and Vermont) prohibit the loan or pledge of state credit to private enterprises or to local governments, or to both, and also forbid the state to subscribe to the stock of private corporations, or to assume the liabilities of individuals, associations, or corporations (and of local governments as well, in about one-third of the states) unless these liabilities have been incurred in repelling invasion. Some constitutions specifically mention railroads, canals, and telegraph companies as coming within the foregoing inhibition.

(a) general

[1] See in this connection Professor Freund's suggested remedy, in *Acad. of Polit. Sci. Proceedings*, V, 125 (1914).

CHAP. XXXVI

(b) indebtedness

Especially important are the constitutional limitations on the power of the legislature to incur indebtedness.[1] These, as well as some of the restrictions just mentioned, have grown out of the reckless extravagance with which many legislatures, during the second quarter of the past century, and in the Reconstruction period in the southern states, poured money into works of internal improvement, such as turnpikes, canals, and railroads, and also involved their states in the banking business. Most states now permit legislatures to authorize loans in only comparatively small amounts and in order to meet casual deficits or temporary emergencies. The amounts thus permitted range from fifty thousand dollars in Maryland and Rhode Island to two millions in Idaho, the usual figure being five hundred thousand dollars or less. About one-third of the states authorize the incurring of debts beyond the constitutional limit, provided any act of this nature is approved in a popular referendum. Furthermore, special conditions are sometimes imposed on borrowing; for example, the making of adequate provision by law for a tax to cover the interest and principal, or requiring repayment within a specified period, or making it necessary to obtain a two-thirds or three-fourths vote of all members of the legislature. In more than half of the states counties, cities, and other local governments are similarly subject to constitutional debt limitations, and the legislature is therefore incapable of extending their borrowing powers.

Maryland recently adopted a constitutional amendment which greatly restricts the freedom of the legislature in making appropriations. The budget of state expenditures is prepared by the governor and is then submitted to the legislature, whose right to make changes in the governor's financial program has been sharply curtailed. In most states, however, the legislature has practically a free hand in appropriating the state's revenues.[2] Lastly, in two-thirds of the states the governor has been given the right to veto, or to reduce, separate items in appropriation bills, as a farther means of checking legislative extravagance. Inasmuch as the legislature is seldom able to overcome an executive veto or alteration, this device proves very effective.

[1] See *Ill. Const. Conv. Bull.* No. 4 (1920), "State and Local Taxation," 247-262, 288-303.

[2] For more details of the Maryland budget system, see H. S. Chase, "The Budget Amendment to the Maryland Constitution," *Nat. Mun. Rev.*, VI, 395-398 (May, 1917); and A. E. Buck, "Operation of the Maryland Budget," in *Amer. Polit. Sci. Rev.*, XII, 514-521 (Aug., 1918).

2. Special legislation

Another class of restrictions has to do with local, special, or private laws, *i.e.*, laws which apply to, or are for the benefit of, some particular person, corporation, or locality, or which are not of general and uniform application throughout the state, or which do not apply to all persons or corporations included in some authorized classification. The control of special legislation is one of the most difficult problems that have confronted constitution-makers. Without some restriction, there is a wide field for favoritism and corruption, and much of the time of the legislature is likely to be frittered away in the consideration of petty matters.[1] As a result of the evils arising in many states from lack of restraints at this point, most constitutions now contain provisions which are designed to prevent, or at all events to restrict, the amount and variety of special or local laws that can be enacted. "For the present at least, constitutional limitations on special legislation are an important and growing part of our fundamental laws. Though they are admittedly subject to serious objections in theory, there can be no doubt that they have been a valuable protection under conditions which have heretofore surrounded the American legislature."

Principal checks

The most common ways in which state constitutions to-day deal with the problem of special legislation are (1) to prohibit special, local, or private laws on any matters and in all cases which can be covered by a general law; (2) to require that all general laws or laws of a public nature be uniform in their operation throughout the state; and (3) to list, in the constitution itself, the subjects which may not be dealt with in special or local laws. Thus we find legislatures expressly forbidden to pass special laws granting divorces; changing the names of persons and places; laying out or altering highways; vacating roads, streets, and public grounds; locating or changing county seats; regulating county and township affairs; providing for changes of venue in civil and criminal cases; regulating the rate of interest on money; chartering or licensing ferries or toll-bridges; regulating elections; remitting

[1] In Illinois between 1862 and 1870 "the private and special legislation evil grew to such proportions that practically the entire time of the General Assembly was devoted to the enactment of private and special laws, while measures of public interest were in many instances stifled or passed without due consideration." *Constitutional Conventions in Illinois* (Springfield, 1920), 21. At the present time North Carolina probably furnishes the worst example of practically unrestricted legislative freedom in enacting local or special laws. See Jones, *Statute Law-Making in the United States*, 39-40. Illustrations of pernicious special legislation relating to municipal government may be found in Chap. XLV below.

CHAP. XXXVI

Ineffectiveness of these limitations

fines, penalties, and forfeitures; changing the law of descent; granting or amending corporate charters; and granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise. In many instances these restrictions have had a very salutary effect. Nevertheless, a great amount of special legislation continues to be enacted in spite of them, for legislatures have found ingenious ways of evading them. The legislatures, however, are not wholly to blame; much special legislation is needed in order to deal satisfactorily with peculiar local problems, and much is enacted at the behest of, and because of the importunities of, the people of some locality or of representatives of some special interest.

The growing complexity of legislative problems and the diversity of local needs seems, indeed, to warrant some relaxation in the rules restricting special legislation.[1] But no really effective mode of properly safeguarding the public interest, while at the same time permitting a reasonable degree of freedom of action to the legislature, has yet been devised. Perhaps a plan embodied in the Michigan constitution of 1908 comes nearest to being a satisfactory solution. Under it, the legislature is prohibited from passing any local or special act in any case where a general law can be made applicable; and whether a general act can be made applicable is for the courts to decide, rather than the legislature itself, as is the practice in many states. Furthermore, local or special laws must receive a two-thirds vote in both houses of the legislature, and are not to take effect until approved by a majority of the electors voting thereon in the district to be affected.

3. Procedure

The constitutional limitations relating to legislative procedure and to the form in which bills are passed are designed for the most part to guard against surprise, to secure reasonable deliberation and publicity, and to insure, in some degree, a sense of responsibility on the part of the law-makers.[2] Among the restrictions belonging to this general class are clauses requiring (a) that all bills and their amendments be printed a certain number of days before final action is taken, although very often the rule is not observed in practice; (b) that every bill be read at large or at length on three different days, although where all bills have to be printed this serves no useful purpose, consumes a large amount of time if observed, and in actual practice is commonly disregarded; (c)

[1] C. L. Jones, *Statute Law-Making*, 43.
[2] P. S. Reinsch, *American Legislatures and Legislative Methods*, 134 ff.

that a yea and nay vote be taken on the passage of all measures, a rule which is also frequently disregarded in practice;[1] (d) that no act embrace more than one subject, which shall be clearly indicated in the title; and (e) that statutes be not amended or revived by reference merely, but rather that all portions amended or revived be included in full.

In Illinois this last requirement has, through judicial construction, resulted in nullifying laws not expressly amending former acts but so altering the effect of a previous law that the two acts have had to be read together in order to find the law upon the subject. The principle—which has been followed by the supreme court of the state since 1900—gives the court the very great power of determining in each case whether an act is sufficiently independent of previous legislation to be upheld as an independent statute or whether it so affects previous legislation as to amount to an amendment thereof, in which case the act comes within the constitutional requirement relating to amendments. "With the large mass of statutes in force at any given time, it is possible to hold that practically any new piece of legislation is amendatory of earlier legislation, and with no definite principles laid down for the guidance of the general assembly . . . the rule sets up practically a guessing contest between the general assembly and the supreme court in which the supreme court has the last guess." Such a result was, in all probability, neither foreseen nor intended by the framers of the Illinois constitution.[2]

By reason of the foregoing, and numerous other, limitations directly or indirectly placed upon legislative procedure—some of which, as in Illinois, have been enlarged by judicial construction—pitfalls exist in almost every direction, and some of them may easily be overlooked in the most carefully planned legislation. Not without reason has legislation been characterized as a hazardous occupation.

4. Frequency and duration of legislative sessions

In early days it was customary to provide for annual elections and for annual sessions of the legislature, but at the present time legislators are elected every year only in New York and New Jersey; and only six states (Georgia, Massachusetts, New Jersey, New York,

[1] To save a large amount of time consumed in roll-calls for yea and nay votes, Wisconsin has installed a system of electrical voting. See "A Machine Vote" in *Literary Digest*, May 12, 1917, p. 1407, and E. B. Rodriguez, "Electric Voting in the Wisconsin Legislature," in *Nat. Mun. Rev.*, VIII, 404-405 (Aug., 1919). The Iowa legislature of 1919 adopted a similar system.

[2] *Ill. Const. Conv. Bull.* No. 8 (1920), "The Legislative Department," 558.

Rhode Island, and South Carolina) have annual legislative sessions. In forty-one states sessions are biennial, with the provision that special sessions may be called at any time; in Alabama the regular sessions are held quadrennially. About three-fourths of the states now limit, in one way or another, the period during which the legislature may sit. These periods vary from forty days in Wyoming to five months in Connecticut; the most common is sixty days or thereabouts, which is the rule in some twenty states. In a few other states there is no absolute limitation, but after the expiration of a certain period the legislators receive reduced pay.

These restrictions arise from a desire to compel legislators to perform their work with despatch, and from a hope of reducing the quantity of poor legislation and of saving the state from evils of over-legislation generally. It has been believed that, with less frequent sessions, subjects of major importance will absorb the interest of the legislators and tend to crowd out trivial matters or matters of merely personal or local interest; that, at all events, with the length of these sessions limited, the amount of poor legislation will be proportionally reduced; and that, meeting more rarely, the legislature will attract greater public attention and thus become a more inviting field of activity for men of ability.

Extended experience with these restrictive provisions shows, however, that it is impossible to affect the quality of the legislative product in any very clear way by mere changes in the length and frequency of legislative sessions. "The result of attempts to cram legislation into a short period has not been to lessen the number of 'bad laws' passed. When public opinion . . . demands legislation, the legislation will be passed. If the sessions are held biennially . . . more work has to be done than if held annually. If the sessions are not only limited as to frequency, but also as to length, there can be but one result: the effort will be made to crowd through all legislation that public opinion demands, with the result that law-making will be crude and haphazard; while on more contentious subjects the legislature will be tempted to abdicate its responsibility by turning over the actual decision to the governor."[1] Indiana furnishes a good illustration in point. Legislative sessions are there limited to sixty-one days, including holidays and Sundays. The routine work of organization consumes some time, and only from forty to forty-five days are actually available for the consideration of bills. A former legislative reference

[1] C. L. Jones, *Statute Law-Making*, 13-14.

librarian in that state,[1] describing the session of 1917, testifies as follows concerning the effects of this constitutional restriction: CHAP. XXXVI

"It is utterly impossible to do the work in sixty-one days. The best intentioned legislature in the world could not do the job in sixty-one days, even if it were not harassed by the job-hunters, peanut politicians, and self-serving lobbyists. To continue to try to do the work in sixty-one days is to continue to play directly into the hands of the people who profit by confusion. One hundred and fifty laws were dumped on the desk of the governor during the last two days of the session. Prior to that time, fewer than sixty had been sent to him. In the closing days, therefore, three-fourths of the legislation of the session was enacted, and in what horrible confusion! The last night of the session members could be found enrolling their own bills in any part of the capitol in order to get them signed by the presiding officer before adjournment. What a splendid chance to slip jokers into bills! What a splendid opportunity for the clever gentlemen who knew exactly what they wanted! In this confusion many good laws came through in such shape as to render them invalid."

5. Initiative and referendum

The wide adoption of the initiative and referendum in connection with ordinary legislation furnishes another conspicuous illustration of the lack of popular confidence in representative law-making bodies. When these modes of "direct legislation" are employed, the final decision as to what shall or shall not become law is, so far as the law-making process is concerned, taken away from the legislature and reserved to the people or the electorate. In spite of frequent assertions to the contrary, the adoption of the initiative and referendum has nowhere in this country been due to any general desire to do away with our traditional representative legislative bodies and to substitute law-making directly by the electorate. It has always been assumed that the great mass of legislation would continue to be enacted by the representative legislature as formerly; and in practice this has proved to be the case. The adoption of the initiative and referendum has simply meant that the electorate has deemed it necessary, in view of unfortunate experiences with legislative bodies, to provide itself with additional checks upon the work of the legislature, whereby, if that body fails to enact laws that are needed or desirable, the people may obtain them by direct action under the initiative; or, when the legislature

[1] Mr. John A. Lapp.

has enacted laws that meet popular disapproval, the electorate may veto them in a popular referendum. In other words, the initiative and referendum are not designed for frequent or everyday use, but are intended, rather, to serve as "the gun behind the door" in emergencies: the less frequently they are invoked, the greater the indication that the legislature is doing its work satisfactorily.

Spread of the initiative and referendum

South Dakota, in 1898, became the first state to adopt the initiative and referendum for ordinary legislation; and since that date nineteen other states have taken a similar step, the last one to do so being Massachusetts, in 1917. In Idaho, however, no legislation has been enacted to carry out the direct-legislation amendment adopted in 1912. In addition to these states, Maryland and New Mexico have the referendum alone.[1] The question of adopting the initiative and referendum has been under discussion elsewhere in recent years. This is notably true of Illinois, where, notwithstanding the refusal of the constitutional convention of 1920 to make provision for either device in the revised constitution soon to be submitted to the people, the main features of the system have been repeatedly endorsed by a large popular vote.[2]

Forms of the referendum

The initiative and referendum laws now in force differ considerably,[3] yet a general characterization of them is not difficult. In the first place, it should be noted that referenda may be either optional or obligatory. An optional referendum takes place when the legislature, desiring to obtain an expression of popular sentiment upon a certain measure, provides that the measure shall not go into effect until it shall have been approved by the voters at an election; or the legislature may leave different districts or counties to determine, each for itself, whether a certain law shall apply to

[1] The complete list of states is as follows: South Dakota (1898), Utah (1900-1917), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907), Maine (1908), Missouri (1908), Michigan (1908), Arkansas (1910), Colorado (1910), California (1911), New Mexico (1911), Arizona (1911), Idaho (1912), Ohio (1912), Nebraska (1912), Washington (1912), Mississippi (1914), North Dakota (1914), Maryland (1915), Massachusetts (1917). An interesting account of instances of the initiative and referendum in colonial New England is K. Colegrove, "New England Town Mandates," *Colonial Soc. Mass. Publications*, XXI, 411-449 (1920).

[2] The initiative and referendum for city ordinances is authorized in almost all commission-governed cities, and this is true of such cities in Illinois.

[3] The various initiative and referendum laws will be found in C. A. Beard and B. E. Shultz, *Documents on the State-Wide Initiative, Referendum, and Recall* (New York, 1912); *Ill. Const. Conv. Bull.* No. 2, "The Initiative, Referendum, and Recall" (Springfield, 1920); *Mass. Const. Conv. Bull.* No. 6, "The Initiative and Referendum" (Boston, 1917).

them. This use of the referendum was not uncommon before 1898. The initiative and referendum which we are here considering, however, are of the obligatory or compulsory type. Where this form exists, legal provision is made for suspending all ordinary legislative enactments for a certain period, usually ninety days from the date of their passage.[1] During this interval the people of the state have an opportunity to scrutinize the work of their law-makers; and if a stated number or percentage of them agree that a given act is undesirable, they can, by filing a petition, prevent that act from taking effect until it has been submitted to the people and ratified by popular vote.[2]

Procedure under the initiative

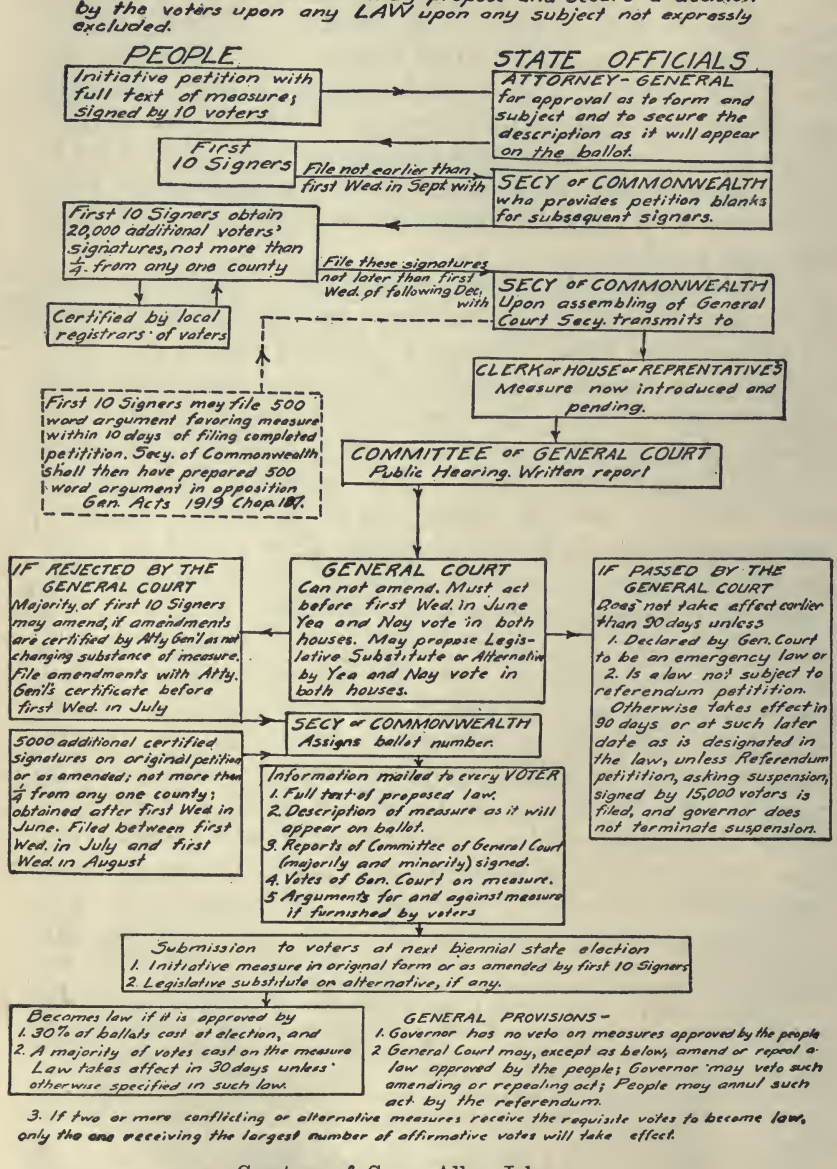
The initiative may be invoked whenever any considerable number of people believe that the legislature has failed to enact necessary and desirable laws. A citizen or group of citizens may, with or without the assistance of lawyers, draw up a bill calculated to meet a recognized need. This done, the next step is to obtain the signature of a specified number of voters to a petition requesting that the bill be enacted into law. The petition is filed with the proper authority, and then either one of two courses is taken, according as the law of the state prescribes. One is called the direct initiative; the other, the indirect initiative. Under the direct initiative, the proposed measure is submitted to the people at the next regular election, or at a special election, without being previously submitted to the legislature. Under the indirect initiative, the bill must be submitted to the legislature at its next session, and if that body acts favorably upon it, it becomes a law without the necessity of a referendum.[3] In most states the legislature is not permitted to amend the bill originating under the popular initiative, but in some states it may submit rival or substitute measures to popular vote. If the legislature fails to act favorably, the bill is referred to the people and becomes a law if approved by the required vote. The

[1] In Massachusetts, 15,000 signatures are required for a referendum petition in order to suspend the operation of an act, whereas only 10,000 are required to bring about a referendum without suspension.

[2] Certain measures, designated as emergency acts, are often exempted from the referendum. In some states it has been possible to prevent referenda on measures by inserting therein a clause declaring them to be emergency measures, when clearly no emergency existed. To put a stop to this practice, Oregon, in 1921, adopted an amendment authorizing the governor to veto the emergency clause in any measure whenever, in his judgment, no emergency existed.

[3] Voters who disapprove a law passed under the initiative may invoke the referendum after its enactment, by compliance with the rules applicable to bills originating in the legislature.

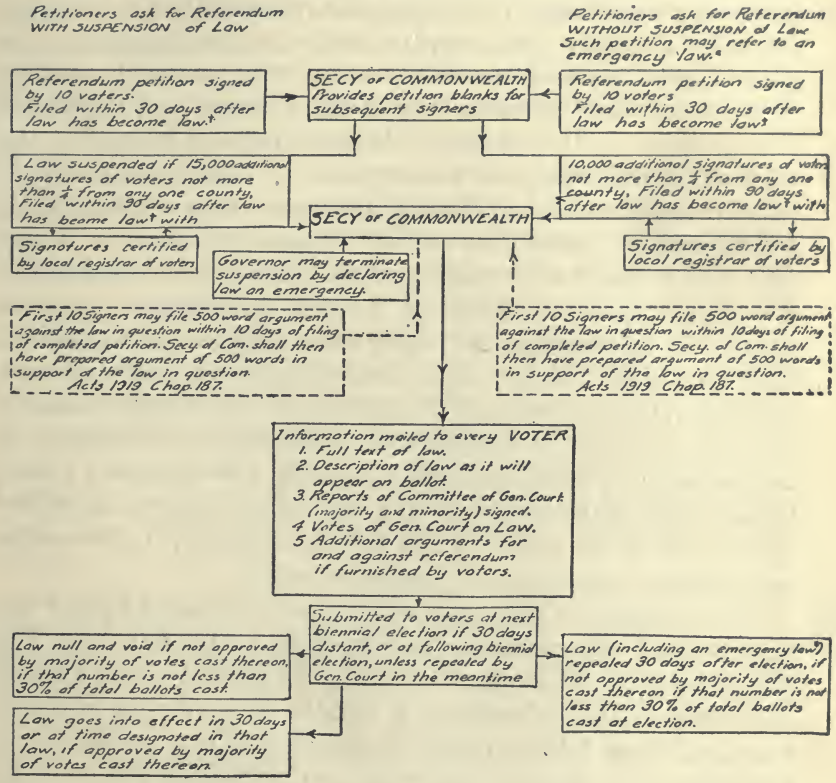
INITIATIVE PETITION IN MASSACHUSETTS



Courtesy of Grace Allen Johnson

REFERENDUM IN MASSACHUSETTS

A Referendum Petition may ask for a referendum to the voters upon any LAW enacted by the General Court which is not expressly excluded.



*"After law has become law" means after all legislative formalities thereon are completed. It may "take effect" at some later date.

Courtesy of Grace Allen Johnson

CHAP. XXXVI

governor has no power to veto any measure passed under the initiative and referendum.[1]

Arguments for direct legislation

The arguments for and against the initiative and referendum have been fully set forth in many places.[2] In summary, the chief advantages urged are: (1) the system unquestionably gives the electorate an affirmative and negative check upon the legislature, the need of which has long been felt in many states, especially in those in which political "machines" or special interests have dominated the legislature; (2) it tends to stimulate popular interest in the work of the legislature, for the electorate is directly responsible if laws are unsatisfactory;[3] (3) it tends to reduce legislative corruption because the legislature's decision on proposed laws is no longer final, and it has been the finality of that decision that has made it worth while to resort to corrupt methods to influence legislative action; (4) inasmuch as the people are given the final word as to what shall be law, many existing limitations on the legislature may safely be relaxed or repealed altogether; (5) constitutions in many instances may also be considerably shortened by the omission of articles dealing in detail with subjects which were purposely placed beyond reach of the legislature at a time when there was no opportunity, such as the initiative and referendum afford, to reverse or to supplement unsatisfactory legislative action.

Objections to direct legislation

Of the numerous objections which have been urged against the initiative and referendum the more weighty are the following: (1) the average voter is incapable of voting intelligently upon matters of legislation; (2) the system is at best "a calling for the yeas and nays, not for a full expression of opinion," for it assumes that every voter is ready and able to give an unqualified yes or no to any question of public policy; (3) the system, by failing to rouse interest on the part of many citizens, often results in the enactment

[1] In some states, *e.g.*, Massachusetts, additional signatures to the initiative petition are required in order to bring the measure to a popular vote after it has failed to pass the legislature.

[2] The most comprehensive discussion of all phases of the initiative and referendum is to be found in the *Mass. Const. Conv. Debates*, II (Boston, 1917). See also, G. H. Haynes, "How Massachusetts Adopted the Initiative and Referendum," *Pol. Sci. Quar.*, XXXIV, 454-475 (Sept., 1919).

[3] In most states having the initiative and referendum "publicity pamphlets" are provided for. These contain an exact copy of all measures referred to the voters, together with such arguments pro and con as interested persons may care to advance. Copies are mailed by some state official to all the voters before each election.

of laws by a minority of the voters;[1] (4) the electorate is often put to the needless trouble and expense of passing upon questions which, although unimportant, may be forced upon the attention of the public through the activities of small organized groups; (5) the method of obtaining petition signatures for legislative measures is often attended by irregularities and fraud;[2] (6) where the initiative and referendum may be used both for constitutional amendments and for ordinary legislation the system places the fundamental civil and political rights of minorities at the mercy of temporary majorities at the ballot box; (7) the system tends to break down the quality of legislatures by weakening the sense of responsibility on the part of the individual member for what is enacted or fails of enactment, since, with the initiative and referendum, the electorate may correct any misinterpretation of its wishes on his part; (8) the system tends to aggravate the burdensome and confusing task already imposed upon the voters by requiring them not only to select a large number of public officers but also to pass upon an unlimited number of legislative proposals which may be submitted on the same ballot; (9) the scheme may be misused by a minority party in the legislature to prevent the principal laws enacted by the majority party from taking effect, as has recently been attempted in Missouri.[3]

A useful device, but not a panacea

Space does not permit pointing out in detail how some of these objections might apply with equal force to the submission of constitutions and constitutional amendments to popular vote; or how others also apply to laws enacted in the usual way by the legislature acting alone; or how still other grounds of objection might be removed by improving the details of initiative and referendum procedure or by withdrawing certain subjects from the operation of the initiative and referendum altogether, as has been done in

[1] C. O. Gardner, "Problems of Percentages in Direct Government," *Amer. Pol. Sci. Rev.*, X, 500-514 (Aug., 1916). "In California, during the years 1908-1915, when no publicity pamphlets were issued, the average vote upon measures submitted was 43 per cent of the total attendance at the polls; in 1916, with the publicity pamphlet in use, it was 79 per cent." W. B. Munro, *The Government of the United States*, 507, note, citing, G. H. Haynes, *The Initiative and Referendum* (Boston, 1917), 37.

[2] See W. A. Schnader, "Proper Safeguards for the Initiative and Referendum Petition," *Amer. Pol. Sci. Rev.*, X, 515-531 (Aug., 1916).

[3] In 1921 the state Democratic organization obtained the necessary petitions for a referendum for practically all of the important measures enacted by the Republican legislature in that year. These measures will come to a vote in November, 1922. See *Nat. Mun. Rev.*, X, 438 (Aug., 1921); *ibid.*, X, 575 (Nov., 1921).

Massachusetts.[1] It must be remembered that the system of direct legislation, as now employed in connection with state law-making, is designed primarily to weaken the influence of bosses, machines, or special interests, such as have dominated many a state legislature at one time or another and often for long periods. As a remedy for such conditions, the system is not infallible, any more than is the Australian ballot or the direct primary. Nevertheless, to many people it seems to be the best expedient available at the present time for vetoing or supplementing the acts of a legislature which proves to be, not a representative, but a misrepresentative, law-making body.[2]

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[1] Under the Massachusetts amendment the following matters cannot be reached through the *initiative:* measures which relate to religion, religious practices, or religious institutions; appointment, qualifications, tenure, removal, recall or compensation of judges; reversal of judicial decisions; powers, creation, or abolition of courts; purely local laws; specific appropriations of money from the state treasury; granting state aid to sectarian institutions; and propositions inconsistent with the right to receive compensations for private property taken for public use, the right of access to, and protection in, the courts of justice; the right of trial by jury; protection from unreasonable search, and from martial law; freedom of speech, press, peaceable assembly, and elections. Exceptions to the operation of the *referendum* include laws which relate to religion, religious practices, or religious institutions; appointment, qualifications, tenure, removal or compensation of judges; creation or abolition of courts; purely local laws; and laws which appropriate money for the current or ordinary expenses of the commonwealth or for any of its departments, commissions, or institutions.

[2] Convenient summaries of recent referenda votes will be found in *Amer. Pol. Sci. Rev.,* XI, 92-103 (Feb., 1917); *Nat. Mun. Rev.,* IX, 146-150 (Mar., 1920); *ibid.,* X, 232-239 (Apr., 1921). See also R. L. Buell, "Democracy in California," *Outlook,* CXXIX, 178-179 (Oct. 5, 1921).

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CHAPTER XXXVII

THE LEGISLATURE AT WORK

General similarity of organization

The legislature is, in general, free to organize itself in whatever manner it chooses and to carry on its work under rules of its own making. Naturally there is variation in these matters from state to state. Yet in their larger aspects organization and procedure are everywhere much the same, partly because similar duties lead to similar modes of action, partly because there has been a good deal of copying by one state from another, but mainly because of the inevitable tendency to follow the example of Congress. The presiding officer of each house, the committee system, the handling of bills and resolutions, the rules of debate—all show the profound influence of the federal analogy.

Officers

The presiding officer in the lower house is, as in the House of Representatives at Washington, a speaker; and, like his national prototype, he is elected by the entire house, although the representatives who belong to the majority party actually choose him in caucus. In most of the upper houses the lieutenant-governor presides, after the manner of the vice-president in the United States Senate; in the other cases a president of the senate is elected by the members of that body from among their own number. These presiding officers exercise substantially the same influence and authority over the proceedings of their respective houses that are exercised by the speaker and vice-president in Congress; and the other members of the legislature enjoy about the same privileges and immunities as members of Congress. The power of the speakership has developed most in states where there is a large amount of business to be transacted, where the house is so large as to be unwieldy, where sessions are of short duration, and also where, as in New York, party lines are closely drawn. Each house of the legislature also chooses a clerk, a chaplain, a sergeant-at-arms, and other necessary officers and attendants.

Committees

Every legislature is subdivided into committees for the more effective consideration of the large number of measures intro-

duced.[1] Appointments to these committees are usually made by the presiding officers of the respective houses, although in almost a third of the states the assignments are made, rather, by a committee on committees. Whichever method is employed, the dominant party almost invariably has a majority in each committee. There is much difference of opinion upon the relative merits of the two methods. In Nebraska, at all events, it is felt that the use of a committee on committees has secured the important places for the persons best fitted for them, has done away with the suspicion of trading committee appointments in order to secure votes for the position of presiding officer, and has distributed committee assignments more equitably than before among the different sections of the state.

Composition and number

The number of senate committees varied in 1917 from five in Massachusetts and Wisconsin to sixty-two in Michigan; in about two-thirds of the upper houses the number exceeded twenty, and in five cases it exceeded forty. The number in the lower house ranged from seven in Massachusetts to sixty-three in Kentucky and sixty-five in Michigan, almost half of the states having forty or more. In Massachusetts and a few other states, instead of two sets of committees, there is a system of joint committees made up of members from both houses. This arrangement has several points of distinct advantage over the dual committee system. In particu-

The joint-committee system

[1] Bills are assigned to appropriate committees by the presiding officer in each house, although his action may be overruled by the house and the bill sent to another committee.

The following are the usual steps in the enactment of a bill, although slight variations are to be found in the different states:

(1) Introduction by any member or by a committee. A member either rises in his place and asks permission to introduce a bill (permission is never withheld) or merely files the bill at the clerk's desk;

(2) First reading, generally by title only, followed by order for printing copies for use of members, and reference to a committee;

(3) Consideration in committee, followed by favorable or adverse report to the house;

(4) Second reading at length, with opportunity for debate and amendment;

(5) Third reading, with some farther opportunity for debate and amendment, followed by the final vote on the perfected bill;

(6) Transmission to the other house, where practically the same routine is followed;

(7) Appointment of a conference committee to adjust differences between the two houses;

(8) Adoption of the report of the conference committee in each house;

(9) Submission of the bill as enacted to the governor for his approval or veto;

(10) Return of the bill, if vetoed, to the house in which it originated; if passed by the requisite majority, it goes to the other house for similar action.

CHAP. XXXVII

lar, it averts the duplication and delay which are more or less inevitable when the same measures are handled by two committees, and it reduces the tendency to shift responsibility from one house to the other.[1] In most states the number of committees is far larger than the efficient handling of legislative business requires. As a rule, it has been determined more by petty personal and political considerations than by the necessities of good procedure. The disadvantages of too many committees are obvious. In the first place, each member is required to serve on more committees than he can actually give time to; in the Illinois senate of 1917 each member belonged, on an average, to eleven committees. Furthermore, too many committees means reference to different committees of matters of the same general nature which could more satisfactorily be handled by a single committee. A reduction in the number of committees in Illinois in 1915 from sixty-six to thirty-three in the house and from forty-one to twenty-six in the senate contributed in a large measure to the increased efficiency with which legislation was handled that year.

Committees commonly too numerous

Even these numbers are needlessly large. In most legislatures, if not in all, business could be handled more promptly and efficiently if a system of joint committees on the Massachusetts model were substituted for the dual committee system; the number of these joint committees should not exceed fifteen, and all should be organized on functional lines. To five major committees on finance, agriculture, industrial affairs and manufacturing, public utilities and municipalities, and judiciary, ten minor committees might be added, somewhat as follows: public efficiency and civil service, elections, enrolled and engrossed bills (or third reading), education, rules, rights of minority, public welfare, hygiene and sanitation, public works, banking and insurance, and miscellaneous matters.[2] If, however, the joint committee system cannot be adopted, there should at least be a uniform committee organization in the two houses; and this organization ought to be coördinated with the administrative organization of the state, in order to bring the legislative and executive branches into closer relationship.

Desirable reorganization

Surprisingly few states have followed the example of California and Nebraska in having a definite schedule of committee meetings and hearings prepared at the opening of each session and assigning

[1] A. N. Holcombe, *State Government in the United States*, Chap. IX.

[2] This is substantially the plan recommended by C. L. Smith in *Amer. Polit. Sci. Rev.*, XII, 607-639 (Nov., 1918).

definite days and hours for the meetings of each committee. With a rule limiting the number of committees on which each member may serve, it is possible so to group committee meetings as to prevent members excusing their absence on the ground that they were attending some other committee meeting. Obviously, the fewer committees there are, the easier it will be to develop such a schedule.[1]

Other defects of the committee system

Other defects of the present committee system must be passed over rapidly. The size of committees is often so large as to make them unwieldy, thus throwing undue power into the hands of the chairmen or of sub-committees. The largest committees are found in Pennsylvania, Illinois, and Iowa, where memberships range from twenty-five to forty-five. Another serious defect in most states is the secrecy—at all events lack of publicity—and the irresponsibility surrounding committee sessions. Few states require committees to publish notices of the time and place of their meetings, as they are compelled to do in Massachusetts and Nebraska; or to maintain public calendars of all committee meetings and hearings, as is done in Wisconsin; or to keep and publish minutes of all proceedings; or to open all sessions to the public. In the great majority of states, furthermore, the two houses have retained insufficient control over their committees, one of the results being the frequency with which committees indefinitely hold up measures which have been referred to them. This situation is deliberately maintained in the interest of the legislative "machine" in some states, especially where there are "graveyard" committees consisting of tried and trusted machine leaders, to which measures are referred with the confident expectation that they will never be heard of thereafter during the session. In 1913 a committee of this sort in the Pennsylvania senate smothered 137 bills which had passed the lower house. Restrictions should be placed upon the length of time which a measure may remain in the hands of a committee without being reported; and the rules should be so amended as to make it easier to compel a committee to report a measure which it has had in its possession for a reasonable length of time.

Overworked and idle committees

Another common defect is unequal distribution of legislative work among committees. In the Ohio legislature of 1919, for example, four committees in the house and four in the senate had no work whatever; four house, and six senate, committees had only one or two measures referred to them; and seven committees in the

[1] Smith, *loc. cit.*, 631.

CHAP. XXXVII

house and eleven in the senate had only three or four measures. In other words, thirty-six committees had nothing, or practically nothing, to do. On the other hand, the senate judiciary committee had eighty-two measures referred to it, and the corresponding house committee had seventy-three; while sixty-one and sixty-six measures went to two other house committees, respectively.[1] Out of a total of 1,041 bills introduced in the lower house in Illinois in 1917, 460 were handled by two committees, while some of the other committees had nothing at all to do. One also often finds the same duplication of older and more influential members on a half-dozen of the most important committees which has appeared in the case of congressional committees, and which is a farther explanation of the success with which the legislative "machine" does its work. In the Illinois senate of 1919, each of seven members was on twenty or more committees, and one member was on twenty-eight. There are also features connected with the operation of the committee on rules, the "steering" committee, and the conference committees[2] which enable these agencies to become autocratic and irresponsible masters of legislative proceedings, especially in the last crowded days of the session.

The "interlocking" system

Importance of reorganizing committees which handle financial legislation

Finally, the committee system in many legislatures should be so reorganized as to bring about closer and more harmonious relations among all committees which in any way, directly or indirectly, have to do with financial legislation. Our legislatures have long had a reputation for wastefulness and extravagance. In part, this arises from the fact that until recently their methods of handling financial measures were full of confusion and in urgent need of systematization. Almost all legislatures have had several committees at the same time dealing with financial matters, each house having its separate set of such committees. Frequently each of these committees and sets of committees has worked more or less independently of, and even in rivalry with, the others. There have been in each house a committee on raising revenue, commonly called the committee on ways and means, and one or more com-

[1] C. A. Dykstra, in *Civic Affairs*, Aug., 1919.

[2] Conference committees are appointed by the respective presiding officers of the two houses when a bill originating in one house has been changed during its passage through the other. It is customary to appoint on such committees, in addition to other persons, the chairmen of the house and senate committees which have had the bill in charge. These conference committees endeavor to reach a compromise on the points of difference between the two houses. If they are successful, the measure as reported by them almost invariably passes both houses without farther debate.

mittees in charge of appropriations bills. But other committees have often handled measures which are not technically appropriation bills although they seriously affect the state finances—for example, bills establishing a state police organization or a state conservation commission. Numerous such measures carrying incidental charges upon the state treasury are passed without any serious attempt to ascertain the total amount of demands upon the treasury until after the legislature has adjourned. As a result, deficits have been very common. Committees on "contingent expenses" are also often found in one or both houses and are a favorite instrument of corrupt politics.

Within the past few years, however, especially in connection with the movement for budget reform, a number of states have introduced important improvements in their methods of handling financial legislation. In a few cases all appropriation bills are assigned to one committee in each house, and to these committees must be referred, before final passage, all measures which directly or indirectly involve an expenditure of state funds, so that a complete and detailed list of charges on the treasury may be tabulated some time before the legislature adjourns. Such reforms might well be carried farther to include a consolidation in each house of the money-raising and the money-spending committees in a single committee, in order to ensure a better balancing of income and outgo than is now possible in most states; and a still greater degree of responsibility would result if a single joint finance committee were to be substituted for the separate committees in each house.[1]

Legislative rules antiquated and difficult to change

Most of the older states more or less deliberately copied the congressional procedure which obtained at the time of their admission into the Union, and the newer states have usually adopted *en bloc* the body of rules in operation in some nearby state, rarely venturing upon any experiments of their own. Once adopted, the rules are seldom changed. Legislators who would not hesitate a moment to propose drastic changes in statute laws or in the organization of the administrative branches of the government commonly display little or no originality, courage, intelligence, or perseverance in introducing and pressing for changes in the rules governing the

[1] Excellent discussions of the committee system will be found in C. L. Smith, "The Committee System in State Legislatures," *Amer. Polit. Sci. Rev.*, XII, 607-639 (Nov., 1918); Reinsch, *American Legislatures and Legislative Methods*, Chap. v; F. E. Horack, "The Committee System in Iowa," in *Statute Law-Making in Iowa* (Iowa City, 1916), 533-609; and H. W. Dodds, "Procedure in State Legislatures," supplement to *Annals Amer. Acad. of Polit. and Soc. Sci.*, LXXVII (May, 1918).

CHAP. XXXVII

proceedings of their own body. These rules should be such as to expedite business, to insure adequate consideration of measures both in committees and on the floor of the two houses, to give a fair opportunity for all parties to be heard in debate, and to insure publicity and responsibility at every stage of the law-making process. In few states, however, have rules been adopted with these ends primarily in mind.[1] Both in Congress and in a great majority of state legislatures rules have been so constructed in times past as to perpetuate the power and influence of a small group of the more experienced members, commonly referred to as the legislative "machine," whose controlling influence might be undermined by simplifying and clarifying the processes of legislation.[2]

Effects of the inexperience of new members

When a legislature assembles for the first time most of the members are inexperienced and wholly unfamiliar with the legislative rules. The older members, or a well organized inner group of them, who know the value of these old rules for their purposes, quickly move the adoption of the rules of the preceding session, commonly without any change whatsoever. This motion usually goes through without opposition from the newer members, who, indeed, seldom know what to oppose. Thus the house finds itself bound by rules which include one relating to the process by which these same rules may be amended. This process has purposely been made very difficult by former legislative leaders in order to prevent "insurgent" or independent groups from overthrowing or undermining the influence of the "machine." Therefore if any thoroughgoing reform in the rules is to be effected the new members must make a careful study of them and their practical operation before the legislature convenes, and must get together and organize before that date, just as the "old guard" does, so as to coöperate effectively in bringing about changes at the strategic moment. Some of these changes, *e.g.,* "gateway amendments" making it easier to amend the rules, must obviously be adopted, if at all, at the opening session before the old guard rivets down the former rules unchanged.

[1] The most recent and comprehensive study of legislative rules is to be found in H. W. Dodds, "Procedure in State Legislatures," published as a supplement to *Annals of the Amer. Acad. of Polit. and Soc. Sci.,* LXXVII (May, 1918).

[2] For an illuminating exposition of the way in which legislative rules may be utilized to perpetuate control of legislative machinery, see Congressman M. Clyde Kelley, *Machine-Made Legislation* (Braddock, Pa., 1912), based upon the author's observations as a member of the Pennsylvania legislature of 1911.

Rules which are really effective in expediting business have been put into operation in fewer than a third of the states. The lack of them often entails very serious consequences, especially in states where the duration of the legislative session is limited by the constitution. Almost everywhere a great deal of time is wasted in the early part of the session, or at best is consumed in organizing, in making committee assignments, and in gaining familiarity with the complicated rules. Moreover, the legislature is rarely in session more than four days a week during the early part of the session. During this time the main work is being done by the various committees; and comparatively few states have rules compelling committees to report on bills assigned to them within a specified time. Certain experienced members deliberately work to delay action on measures in which they have a peculiar interest. The result is a most unseemly crowding of business into the last two weeks or ten days of the session, during which the houses work overtime, and often amid the most demoralizing confusion.

Congestion of business during the closing days of a session

One legislature which was in session four months and in that time passed over eight hundred laws and resolutions enacted half of this number in the last fifteen days, at an average rate of almost thirty a day, an even hundred being passed on the last day. In the closing session of the New York legislature in 1916 one hundred bills were passed between the hours of midnight and half-past six in the morning, twelve bills going through at one stage of the proceedings in the space of two minutes.[1] Under such circumstances enormous power is wielded by the speaker, by the irresponsible committee on rules or the "steering" committee, and by conference committees; constitutional requirements are disregarded under "unanimous consent," and abundant opportunities are presented for trickery of all sorts and for blind-voting on the part of the inexperienced.[2]

How congestion is avoided in Massachusetts

That such congestion is quite needless is proved by the experience of Massachusetts. Although the number of bills introduced in the legislature of that state exceeds the number appearing in many other states, no final rush of the kind that has been described ever takes place. The rules are devised largely for the purpose of obtaining a prompt consideration of measures, and a joint com-

[1] *Municipal Research*, No. 72, p. 64, note 2 (Apr., 1916).

[2] See *World's Work*, XXII, 14,789 (Sept., 1911), "Is This Representative Government?" on the disorder attending the closing days of the Pennsylvania legislature in 1911. Similar conditions arose in the closing sessions in 1913.

CHAP. XXXVII

mittee system has contributed greatly to the achievement of that result. Substantially all measures are introduced early in the session, which opens in January. Committees are required to report on all measures referred to them not later than the second Wednesday of March; and although this period may be extended by one month, at its expiration all measures in the hands of committees must be reported within three days, except appropriation bills.[1] After reporting and second reading, bills go to the committee on third reading, and if there is delay here a report may be forced. Ordinarily this committee reports within two or three days, and the bill is then voted on. It should be added that this committee on third reading exercises a careful scrutiny of each bill before final passage to see what defects there may be in it, and how it fits in with existing legislation. This part of the committee's work is attended to by a trained secretary, and the result is that the laws of Massachusetts are on the whole probably not excelled in technical form by those of any other state.

Most legislators are not experts

None of our state legislatures can by any stretch of the phrase be called a body of experts on either the form or the substance of legislation. Members come from all walks of life and ordinarily give only a few months once in two years to the business of lawmaking. Apart from the lawyers, who generally form the largest single group, few have had training or experience which in any degree specially qualifies them to frame laws; and in view of the numerous pitfalls which lie in the legislator's pathway, it may be doubted whether many of the lawyers who appear in legislative bodies are able to draw up important public measures in proper technical form. Furthermore, a comparatively small proportion of the members of either house have had previous legislative experience. Rarely does it happen, as it did in Illinois in 1917 and 1919, that a majority in each house has served in former legislatures; far more commonly, only a third or a fourth of the members have had any experience in legislative work.[2]

[1] Similar time-limits are in force in only about one-third of the states. See *Ill. Const. Conv. Bull.* No. 8 (1920), "The Legislative Department," 560 ff. For further details relating to procedure in the Massachusetts legislature, see L. A. Frothingham, *A Brief History of the Constitution and Government of Massachusetts* (Cambridge, 1916), Chap. VII.

[2] Out of 153 members of the lower house of the Illinois legislature of 1917, 90 had served in the preceding legislature, as had 14 out of the 25 newly-elected senators. Two years later, the house had 97 members, and the senate 19, out of 26 newly-elected members, who had served in the previous legislature. On the other hand, in the Minnesota lower house in 1911 only 45 out of 120 had served before; in Missouri in 1911, only 41 out of 143; in North Dakota

Bills are commonly drafted outside of the legislature

This lack of special qualifications for the technical side of law-making is not so serious as might be supposed, for, contrary to the popular impression, comparatively few measures are drafted by the legislators themselves. The great majority of bills are prepared by lawyers outside the legislature who have been employed for that purpose by private individuals, associations, committees, or corporations, or by county, municipal, or other local government bodies; or they are prepared by some of the principal state executive officers. Bills drawn by one or another of these agencies may be formally introduced in the legislature by any member. Ordinarily, the member who renders this service assumes no responsibility for the measure which he presents, and he may expressly disclaim all responsibility for it by saying that he merely introduces it "by request." Unfortunately, no limit is placed upon the number of measures which individual members may introduce, and no satisfactory way has yet been devised of checking the avalanche of good, bad, and indifferent legislative proposals which descends biennially in practically every state.[1]

Bill-drafting bureaus

To meet the ordinary legislator's need for assistance on the technical side of law-making, a considerable number of legislatures have created a bill-drafting bureau, usually in connection with a legislative reference library, although in some instances the two are entirely distinct; and every member is privileged to avail himself as much as he likes of the assistance which this bureau, through its experts in bill-drafting, can render in putting his ideas into proper form for enactment into law. Our state laws, in general, would be greatly improved in form, and fewer of them would be declared unconstitutional by the courts on purely technical grounds, if every measure had to pass the scrutiny of a well-trained staff of draftsmen before its introduction, or at least before its final enactment. For the successful operation of such a bill-drafting agency, it is essential that adequate salaries be paid the members

in 1909, only 24 out of 95; and in Vermont in 1911, only 22 out of 246. See *Ill. Const. Conv. Bull.* No. 8 (1920), "The Legislative Department," and C. L. Jones, *Statute Law-Making*, 12-13.

[1] In Nebraska in 1913 over 1,300 bills were introduced in the lower house alone. In Illinois in the same year 1,617 measures were introduced in the two houses, and this record was broken in 1917 when 608 bills were introduced in the senate and 1,039 in the house, making a total of 1,647. In Ohio 987 bills were introduced in 1911, 1,139 in 1915, and 947 in 1919. In twelve state legislatures in 1915 more than 22,000 bills were introduced, while in 1913 the total number of measures introduced in the legislatures of forty states was in excess of 55,800. For tables showing the number of bills introduced in the regular legislative sessions of 1911-1916 inclusive, see *Equity*, Jan., 1919.

CHAP. XXXVII

of the staff, that they be appointed only after examinations thoroughly testing their ability, and that their positions be permanent and entirely free from any taint of the spoils system or partisanship.

Wise legislation involves careful study of proposed laws

Far the greater portion of the legislator's time is occupied in studying and making up his mind upon the merits of bills which have been prepared in one or another of the ways mentioned. Many of these measures affect large classes in the community and deal with highly complicated problems connected with manufacturing, mining, transportation, banking, insurance, taxation, the regulation of professions, the reorganization of local and state government, and numerous other subjects upon which even the best qualified legislator may well feel incompetent to act wisely without a great deal of reflection and enlightenment. To legislate intelligently upon such matters demands not merely good intentions, honesty, and fair-mindedness, but great industry and painstaking study of the conditions or problems which are to be affected by the proposed legislation. Happily, if the legislator's previous experience or study has not placed him in possession of first-hand knowledge of these matters, he may, if he is industrious and conscientious, acquire the requisite information in one or more of several different ways.

Sources of information: 1. legislative reference libraries

First, he may go to the legislative reference library; in almost every state such an institution has been established within the past ten or fifteen years. There he will find that a trained staff has collected and carefully indexed for ready reference a great amount of useful material pertaining to subjects which may come before the legislature, such as taxation, education, labor, pensions, regulation of public utilities. He will find similarly available the statutes of the different states, judicial decisions interpreting and applying these statutes in concrete cases, documents showing the weaknesses or defects which have developed in the actual administration of the laws, reports of state administrative officials, and governors' messages. He may receive valuable assistance from the library staff in drafting a measure which he has in mind, and also useful information regarding the way in which it may be safely steered through the intricate channel of legislative procedure. The extent to which legislators avail themselves of this source of help naturally varies greatly from state to state, and from legislature to legislature in the same state, and some members probably make no use of it whatever. Nevertheless there is great gain in having such an insti-

tution at hand for the use of those who care to take advantage of it.[1]

2. reports of special commissions

Special commissions are not infrequently authorized by the legislature to investigate difficult and complicated problems and report their recommendations at a later session. Reports of such commissions dealing with taxation, the reorganization of the administrative branches of the state government, revision of the election laws, workingmen's compensation and other labor laws, insurance laws, civil service retirement and pension funds—to mention only a few—have been important aids to intelligent legislative action in more than one state in recent years.

3. committee hearings

Public hearings before committees constitute another channel through which legislators may acquire useful information concerning pending measures. At such hearings arguments for and against a bill are presented to the committee having the measure in charge by private individuals, either in person or by attorney, and by private and public corporations through their officers or other representatives. Unfortunately, however, the legislators who are not on the committee are so occupied with other duties that they seldom find time to attend such hearings, and therefore do not often directly receive much enlightenment therefrom.

The content of legislation

Upon broad matters of public policy, such as prohibition, woman suffrage, income taxes, and state aid for highway construction, the ordinary legislator may well represent, without much special study or investigation, the sentiments and desires of the community which elected him. But such broad subjects come before the legislature rather infrequently as compared with more detailed and technical questions. The same is true of laws relating to the rights and liabilities of citizens in their everyday social and business relationships, which, in most states, are in a fairly static condition; only a comparatively small part of the work of the legislature relates to the development of rules for the regulation of these relationships. For example, it has recently been roughly calculated that of the 338 laws passed by the legislature of 1917 in Illinois, only seventeen can be classed as primarily regulating the private rights of individuals, and that of 429 passed in 1919 only fourteen

[1] For a detailed account of the organization and methods of the Wisconsin legislative reference library, see Charles McCarthy's article reprinted in Reinsch, *Readings on American State Government*, 63-74. See also, J. A. Lapp, "Making Legislators Law-Makers," *Annals Amer. Acad. Polit. and Social Sci.*, LXII, 172-183 (May, 1916); E. Cleland, "Bill-Drafting," *Amer. Polit. Sci. Rev.*, VIII, 244-251 (May, 1914).

CHAP. XXXVII

can be so classed. Of the remaining 415 in 1919, sixty-seven related to state appropriations, 177 to state administrative matters, and 171 to local administrative matters.[1] If the foregoing data may be assumed to be fairly typical of the work of legislatures generally, the great bulk of state legislation pertains to such subjects as taxation, to appropriations for the support of the many state offices and the varied institutions and activities maintained by the state, and to the work of county, city, and other local governments.

Desirability of closer official relations between the legislative and executive branches

Most of the information which legislators need in order to act intelligently on such matters must come directly or in various roundabout ways from the officers, boards, or commissions having most to do with those things and therefore presumably better informed upon them than the average legislator is apt to be. To the governor, therefore, to the heads of the various executive departments, to the superintendents of state institutions, to the directors of various state activities, to state administrative boards, to local government officials, and particularly to state officers who have a general supervision over various functions of local-government units (for example, the state tax commission, the state board of education, and the public utilities commission)—to all of these our legislators are obliged to look in order to obtain the information which is essential to intelligent legislation.

How this relation might be brought about

Inasmuch as probably nine-tenths of the work of the legislature to-day has to do with the administration of state and local government, the dependence of the legislature upon the administrative organs of the government for information, and the dependence of the administrative authorities upon the legislature for power and for funds, points forcefully to not only the desirability, but the necessity, of close coöperation between the legislative and administrative departments if either is to do its work effectively. Unfortunately, whatever connection and coöperation exist to-day between them has to be achieved in roundabout ways. This condition is likely to continue until legislatures adopt rules permitting the governor and other executive officers of the state to prepare and introduce measures relating to their respective offices or departments and giving such measures a specially favored place on the legislative calendars; and until legislatures adopt rules permitting and requiring the governor and other state executive officers to

[1] See *Ill. Const. Conv. Bull.* No. 8 (1920), "The Legislative Department," 588-589.

appear on the floor of either house to explain and defend their requests for appropriations or for other legislation. It must be admitted, however, that there is slight reason to expect that many legislatures will, in the near future, introduce these desirable changes. Jealousy of executive influence and prestige is more than likely to prompt instant declaration, when the change is suggested, that "the fathers" in their wisdom decreed that the two departments of government should be and should remain separate and independent, and that to adopt the proposed arrangement would mean to violate the spirit, if not the letter, of the constitution. The people in most states will therefore probably have to wait until a constitutional convention gives formal recognition in the fundamental law to the importance of more direct official relations between the administrative and legislative organs of government. Meanwhile, the effectiveness of state legislatures will continue to be seriously impaired by adherence to theories of the separation of governmental powers which, in the domain of state government, as in that of municipal government, have been proved by long experience to be injurious if rigidly applied.[1]

The lobby

In conclusion, brief mention should be made of the lobby, which is perhaps the most powerful of all influences shaping state legislation. "The lobby" is a collective term applied to the people who undertake to persuade the members of the legislature to oppose or to support measures which are coming up for consideration; a man or woman who makes a practice of this sort of thing is called a "lobbyist," and the practice itself is known as "lobbying." The term must not be taken to imply the corrupt use of money, or indeed any improper motive or conduct. On the contrary, it often happens that where the lobby is most industrious, numerous, and successful, corruption is wholly absent; lobbying is often of great educative value to legislators who are personally unacquainted with the merits or defects of pending bills. There are, in fact, two well-defined classes of lobbyists. The first consists of perfectly honorable men

[1] E. M. Sait, "Participation of the Executive in Legislation," *Acad. of Polit. Sci. Proceedings*, V, 127-140 (1914); H. L. Stimson, "Responsible State Government," *Independent*, LXXIX, 14-15 (July 6, 1914); W. D. Hines, "Our Irresponsible State Governments," *Atlantic Monthly*, CXV, 634-647 (May, 1915); C. L. Jones, "The Improvement of Legislative Methods and Procedure," *Amer. Polit. Sci. Rev.*, Supplement, VIII, 191-215 (Feb., 1914). See the plan of legislative reorganization advocated by Governor Hodges of Kansas in 1913, entitled "Distrust of State Legislatures: the Causes; the Remedy," reprinted in Young, *The New American Government and its Work*, 643-651; also the legislative organization outlined in the "Model Constitution," of the Nat. Mun. League, *Nat. Mun. Rev.*, IX, 711-715 (Nov., 1920).

and women who adopt open-and-above-board methods of influencing members of the legislature. The other is composed of the "harpies and vultures of politics," consisting usually of paid attorneys of corporations, and including many former members of the legislature, who understand the inner workings of the legislative machinery. It is this second class, very largely representing special interests and employing means more or less corrupt, that gives the lobby a bad name; it is perhaps the chief cause of undesirable legislation and of the defeat of measures framed to promote the public well-being.

From the vantage point of one who has long been a student of government and has had much practical experience as a member of a state legislature, it is asserted that "the system of lobbying in legislative halls in America ought to be sharply scrutinized and modified. The lobbyist ought to be put under strict rules, and in the event of a clearly substantiated and deliberate misrepresentation made to a member of the legislature or any committee, or in the event of the use of deception and disingenuous methods, should be subject to the penalty of disbarment which a lawyer suffers when he misrepresents facts to a court. The modern lobbyist holds a more intimate relation to the course of legislation and to the ultimate effect of it than either the lawyer or the judge. The lobbyist is in a position to tamper effectively with law at its source. . . ."[1] Although some efforts have been made to regulate the lobbyist's activities by legislation in New York, Massachusetts, Wisconsin, and a few other states, little has been accomplished, and this continues to be one of the numerous unsolved problems of American state government.

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(See also reference list on p. 605.)

CHAPTER XXXVIII

THE STATE EXECUTIVE

Executive and administrative offices

To carry into effect public policy which has been enacted into law, and to perform other duties prescribed by the constitution and the statutes, two main groups of state offices are everywhere provided. The first consists chiefly of the offices of governor, lieutenant-governor, secretary of state, auditor or comptroller, treasurer, attorney-general, and superintendent of public instruction, which are regularly created by the constitution, and which are commonly called the state executive offices. The second consists of newer boards, commissions, and offices, established, as a rule, by statute, and usually known as the state administrative organs or agencies. Both groups exist for the same fundamental purpose, *i.e.*, to carry into effect public policy which has been embodied in law; and the distinction between them is not hard and fast. It is not unusual, for example, to speak of all the activities carried on by the non-legislative and non-judicial parts of the state government as "state administration." None the less, it will make for clearness if we take account first of those offices that are essentially executive, and reserve the administrative services proper for treatment in the succeeding chapter.

The governor

No one needs to be told that the most important executive officer of a state is the governor. Every colony in the days before the Revolution had a governor, and, notwithstanding popular dislike of the power which that official wielded, every one of the new state constitutions provided for a continuance of the office, albeit with authority considerably reduced. The organized territories of later times had governors, and all carried the office over into their new state organization as a matter of course. In only two of the colonies, as we have seen, was the governor elected, even indirectly, by the people; and in a majority of the original thirteen states choice was made by the legislature. The plan of popular election, however, gradually won its way, and it nowadays prevails in every one of the forty-eight states.[1] Candidates are nominated either in

Election

[1] Election is by direct popular vote except in Mississippi, where a curious mixed system prevails.

state-wide direct primaries in which every properly registered voter of each party is entitled to participate or by state conventions made up of delegates selected by the members of each party in such subdivisions of the state as counties and congressional or legislative districts. Ordinarily a plurality elects, although in a few states a majority is required; in the latter case there is provision for choice by the legislature in the lack of a popular majority for any one of the candidates.

Qualifications, salary, and term

All state constitutions require the governor to have certain qualifications. He must always be a citizen of the United States; and in all but a few states he must be at least thirty years of age. Usually he must have resided in the state for a period of five years. His compensation is either definitely fixed in the constitution or left to the discretion of the legislature. At the present time, salaries range from $3,000 up to $10,000 in four of the states and $12,000 in Illinois. In twenty-three states the governor's term is fixed in the constitution at four years; in twenty-four states, at two years; while New Jersey elects every three years. The newer constitutions show a tendency to change from the two-year to the four-year term. As a rule, the governor is eligible for immediate reëlection, and for reëlection any number of times; but in Indiana, Pennsylvania, and some other states he may not serve two consecutive terms.

Removal

The governor and other principal state officers may be removed by impeachment. But the power is seldom exercised, as is indicated by the fact that only nine governors have ever been impeached. Five of these impeachments occurred in the South during the Reconstruction period: one governor was removed from office, one resigned to avoid removal, and in the other cases the charges were dropped. In the North, two governors were impeached during the same period, one being acquitted, and the other removed from office for embezzlement of state funds.[1] The only later instances are the impeachments of Governor Sulzer of New York in 1913 and Governor Ferguson of Texas in 1917, both of whom were removed from office.[2] In eleven states a new and more expeditious mode of removing principal state officers has been adopted in recent years, known as the "recall." This takes the form of a special election held after a petition has been signed by a specified number of voters asking for such an election, and after rival candidates have been placed in nomination. If one of the latter receives more votes than the gov-

The recall

[1] A. N. Holcombe, *State Government in the United States*, 342-343.
[2] *Amer. Polit. Sci. Rev.*, XII, 111-115 (Feb., 1918).

CHAP. XXXVIII

ernor or other official whose removal is sought, the latter is said to be "recalled," and the successful candidate succeeds to the office and serves out the unexpired term. North Dakota is the first state to make actual use of this method of removal in order to depose an officer elected by the voters of the state at large. In October, 1921, the governor, attorney-general, and commissioner of agriculture of that state were recalled because of dissatisfaction with the administration of certain policies inaugurated by the Non-Partisan League.

Succession

In case of the governor's death, resignation, removal, or absence from the state, the lieutenant-governor, in two-thirds of the states, succeeds to the office. This, however, is never true when the governor has been recalled; the successor is then the rival candidate who polled a plurality of the popular votes at the recall election. When there is a vacancy in the lieutenant-governorship, or where that office does not exist, the succession follows some order which is laid down in the constitution or the statutes. In these cases the president of the senate usually succeeds, and after him the speaker of the house.

Powers and functions

Although the legislature is the chief organ for the enactment of state laws, it is not the only part of the government that partakes of that function. Some legislative authority is exercised in every state by what are called quasi-legislative boards or commissions, upon which has been conferred the right to issue ordinances or regulations having the force of laws, and applying to the operation of public utilities and other corporations, to the protection of the public health, and to a large variety of other matters.[1] But a far more important subsidiary agency in law-making is the governor. Indeed, as a factor in legislation he is scarcely second to the legislature itself; for, although his legal authority in this field is largely of a negative character, he is often able to exert also much positive legal or extra-legal influence in determining both the form and the substance of the laws that are passed.

Relations to legislation:

1. the veto

The desirability of giving the governor some official share in the formulation of the public will into law is practically everywhere recognized by granting him the veto power. Originally the states bestowed this power grudgingly, or not at all; of the earliest state constitutions, only those of Massachusetts, New Hampshire, New York, and South Carolina made provision for it.[2] Now-

[1] U. G. Dubach, "Quasi-Legislative Powers of State Boards of Health," *Amer. Polit. Sci. Rev.*, X, 80-95 (Feb., 1916).

[2] See p. 114.

adays, however, it appears in every state except North Carolina; and it enables the governor to exert a tangible influence in legislation which is equivalent to not less than that of one-half of the legislature, with only the limitation that it can be employed only in the negative.

Period allowed for executive consideration of bills

Before any bill passed by the legislature becomes a law it has to be submitted to the governor, and if he vetoes it, it fails unless the legislature passes it a second time by the requisite majority. The time allowed the governor for consideration of bills varies somewhat from state to state: during the legislative session, in eleven states he has only three days; in twenty-two states he has five days; in three states, six days, and in eleven states, ten days. If he fails either to approve or veto a bill within this period, it becomes law automatically. If, however, the legislature adjourns within this time the bill, in twenty-one states, fails to become law unless the governor subsequently approves it. In other words, the governor in these states has a "pocket veto," or veto by inaction, corresponding to that enjoyed by the president of the United States.[1] On the other hand, in Maine and five other states,[2] if the legislature adjourns within the period allowed for consideration, bills become laws unless the governor returns them with his objections at the beginning of the next legislative session.

Of more importance is the length of time allowed for the consideration of bills after the legislature adjourns; for the bulk of legislation is passed shortly before adjournment. In thirty-four states the governor is given a definite time following adjournment, ranging from six to thirty days, in which to approve or disapprove measures that have been passed. In twenty-three of these states, bills become laws unless the governor files his objections within a specified period. In the other states, notably California and New York, no bill becomes a law unless signed by the governor within that period. "In such states the governor sits after the close of the legislative session practically as a third chamber. He grants hearings to advocates and opponents of measures which have received legislative approval, refers legal and financial questions to his attorney-general or other advisers, and in general does what he can to determine for himself whether the measures proposed by the legislature should be enacted."[3]

[1] See p. 277.
[2] Florida, Indiana, Mississippi, Nevada, and South Carolina.
[3] A. N. Holcombe, *State Government in the United States*, 329.

Bills passed over the veto

The size of the vote required in the legislature to overcome the governor's veto also varies: in Connecticut a mere majority of a quorum in each house suffices, and in seven other states a majority of the full membership is adequate; in five states a three-fifths vote is required; elsewhere a two-thirds vote is necessary, based, in twelve states, on the number present, and in the remaining twenty-two, on the total membership.

Extent of the veto power

The scope of the veto power, likewise, differs. In some states a bill must be accepted or rejected as a whole, even though some parts of it may be deemed good and others bad. In the case of appropriation bills, this has often resulted in forcing the governor to accept an entire measure, including items unnecessarily large or for unworthy projects, or else to veto the entire bill and thus perhaps delay indefinitely the voting of necessary funds for carrying on the state government. In such a situation most governors have preferred to accept the former alternative. To enable the governor to check the common legislative tendency towards wastefulness, extravagance, and expenditures for purely local objects, almost two-thirds of the states, however, have now conferred upon him the right to veto separate items in appropriation bills. In Pennsylvania and a few other states this has been construed to permit the governor, not only to strike out separate items, but to reduce the amount of any item. This latter development may work out badly, as it has done in Pennsylvania, where the legislature has been able to gratify local constituencies by voting appropriations far in excess of the estimated revenues of the state, thus transferring to the governor the burden of whittling down the appropriations and of shouldering whatever local unpopularity may result. Two states, Washington and South Carolina, have gone so far as to permit the veto of any section or sections of any bill presented to the governor.

"Grading the states according to the apparent strength of the veto provisions in their constitutions, the first rank would be given to New York, Pennsylvania, Missouri, California, and Colorado. In each of these states the governor may veto items in appropriation bills, he has ten days for the consideration of bills during the session of the legislature, and thirty days at the close of the session, and a two-thirds vote of the total membership of each house is required to pass a measure over his objections. At the other end of the list, the states where the veto power appears to be the most restricted are Connecticut, Indiana, and Tennessee. In none of

these can the governor veto appropriation items,'' the time for consideration of measures is only three or five days, and a majority vote is sufficient to override a veto.[1]

Frequency with which the veto is used

The extent to which use is made of the veto depends upon the political and personal relations between the governor and the legislature, and especially upon the nature of the veto power itself. Vetoes are naturally more numerous in those states in which it is possible to disallow separate items in appropriation bills; in 1915 there were almost ten times as many vetoes in those states in proportion to the total number of bills passed as in the states where the veto is more restricted. In the one group, the veto was applied to the whole or to parts of about one measure in seven; in the other, to only about one bill in seventy. Altogether, more than a thousand separate bills or parts of bills were vetoed in that year. The largest number was in California, with 225 out of 996 bills passed; Pennsylvania, with 211 out of 1,003 bills; and New York, with 233 out of 980 bills. On the other hand, in Rhode Island there were no vetoes, and there was only one in each of four other states. In only five states were any bills or parts of bills reënacted after the governor vetoed them; these numbered only twenty-two, or about two per cent, out of a total of 1,066 vetoes.[1]

Indirect effects of the veto power

The full effectiveness of the veto is even greater than is indicated by the large number of bills vetoed and the small number passed a second time. A mere hint from the executive office that a veto may be expected if a certain bill passes is often sufficient to kill it; and frequently something more than a hint to this effect is forthcoming. The possibility of a veto often impels members of the legislature to ascertain what the governor's attitude is likely to be before they even introduce a measure which they have in mind. Furthermore, in informal conferences with members of the legislature, or in more formal committee hearings, the governor may suggest amendments which must be made in order to render a bill satisfactory to him. Not infrequently, also, a veto message points out specific objections to certain parts of a bill, and new bills are introduced and passed with the objectionable feature omitted or amended. In such ways, the governor's power in legislation, which in law is of a purely negative character, may be

[1] J. A. Fairlie, ''The Veto Power of the State Governor,'' *Amer. Polit. Sci. Rev.*, XI, 484 (Aug., 1917).

[2] Holcombe, *op. cit.*, 327-328. In Illinois only two bills have been passed over the governor's veto (to 1922) since the adoption of the present constitution in 1870.

CHAP. XXXVIII

transformed, without changing a letter of the constitution, into a positive, affirmative influence; although it should be added that Alabama, Virginia, and Massachusetts have inserted in their constitutions provisions which definitely authorize the governor to propose amendments to bills which might otherwise incur a veto. Obviously, executive influence of this kind can be exerted only upon bills which are considered some time in advance of the close of a session; it does not affect the great number of bills regularly put through on the eve of adjournment. None the less, possession of the veto has incalculably strengthened the arm of the governor whenever he has undertaken to exercise an affirmative influence upon legislation by taking the lead in initiating and putting through a legislative program which is demanded or approved by intelligent public opinion.[1]

2. Special sessions of the legislature

But the real starting point for this positive or affirmative influence of the governor upon legislation is to be found in his right to call special sessions of the legislature and to send formal messages to the two houses whenever they are in session. In about half of the states the legislature, when convened in special session, may consider only the subjects which have been included in the governor's call. Hence, by specifying certain topics in his summons, the governor may practically compel the legislature to consider these matters and to put itself more or less fully on record concerning them.

3. Messages

Every state constitution likewise contains a clause requiring the governor to inform the legislature from time to time, by messages and addresses, upon the condition of state affairs.[2] Like similar communications of the president, these messages are not infrequently addressed over the heads of the legislators to the people of the state at large in the hope of creating a public sentiment that will compel the legislature to enact measures which otherwise it might be reluctant to pass. By restricting his messages to a few definite recommendations embodying policies which his party has endorsed in its platform, or policies for which he is individually

[1] Mathews, *Principles of American State Administration*, 69. See also J. A. Fairlie, "The Veto Power of the State Governor," *Amer. Polit. Sci. Rev.*, XI, 473-493 (Aug., 1917); N. H. Debel, "The Veto Power of the Governor in Illinois," in *Univ. of Ill. Studies*, VI, Nos. 1-2 (1917); J. A. Swisher, "The Executive Veto in Iowa," *Iowa Jour. Hist. and Polit. Sci.*, XV, 155-213 (Apr., 1917); K. E. Carlson, "The Exercise of the Veto Power in Nebraska," *Univ. of Neb. Hist. and Polit. Sci. Ser.*, Bull. No. 12.

[2] The messages of the governors of the several states to the legislative sessions held in 1921 are summarized in *Amer. Polit. Sci. Rev.*, XV, 253-258 (May, 1921).

willing to assume responsibility, the governor may become an influence of prime importance in shaping legislation; and he is the more likely to do so if he takes the trouble to have bills drafted incorporating his recommendations. He need never fail to find some member of the legislature who will be willing to introduce the measures thus prepared; and it sometimes happens, as in the Illinois legislature of 1913,[1] that bills thus originating with the governor or executive departments are given a specially favored position upon the legislative calendar. Whether the governor's recommendations or bills receive favorable consideration depends largely upon his tactfulness, his persuasiveness in winning members to his program, the extent of the popular support back of his measures, and, not infrequently, the vigor with which he wields the veto and uses his control of state patronage as clubs to compel the reluctant support of some members. Naturally, his power will go farther, too, if his own party has a majority in the two houses.

4. Budget-making

The rapid spread of the movement for budgetary reform in connection with state government has much enhanced the influence of the governor in his relations with the legislature. A large majority of the states which have recently adopted improved budgetary methods have recognized both the appropriateness and the importance of assigning to the governor the leading part in the preparation of the state budget. No other official or group of officials can perform this work so satisfactorily; the governor is held responsible for the economical and efficient conduct of the state government and is in a position to know more intimately than any other state official the needs of the various administrative branches and state institutions. Upon him, therefore, or upon some officer directly responsible to him, has rightfully been imposed the duty of collecting from the various departments and institutions estimates of their needs for the ensuing fiscal period, of revising these estimates, of forecasting the probable revenues of the state and the amounts needed to be raised by taxation, and of submitting this information to the legislature in good form as a basis for intelligent action by that body.[2]

Obstacles to the governor's leadership

Notwithstanding the theory of separation of powers on which our state governments are based, the public has, in the past twenty years, come to look more and more upon the governor as a legislative leader and to hold him responsible for having, and for putting

[1] *Amer. Polit. Sci. Rev.*, VII, 239 (May, 1913).

[2] The movement for budget reform will be farther considered in Chap. XL.

CHAP. XXXVIII

through, a definite program of legislation, very much as the country at large has come to hold the president responsible for getting legislation through Congress.[1] The governor, however, is always handicapped in his legislative leadership, as is the president, by the practical restriction of his direct contact with the legislature to personal interviews, and by being obliged to entrust the explanation and defense of his measures in each house to some member thereof. Manifestly, his influence as a leader in law-making would be much increased, and a greater degree of harmony and coöperation between the executive and legislative branches would be attained, if the governor and the heads of executive departments were given the right to introduce bills on their own responsibility and to sit in the legislature, although without a vote. This arrangement would carry with it the privilege of explaining and defending their recommendations and bills, and would afford them opportunity to impart first-hand information and to answer any questions that might arise in the course of debate. Thus far, no legislature has been willing to make this important concession. But if we are to continue to hold the governor responsible for putting through a legislative program, we cannot fairly deny him direct and official access to the legislature. Apparently this innovation will have to await the action of some constitutional convention or the adoption of a popularly initiated amendment; but, once the plan is tried, its rapid spread among the states, either by constitutional amendments or by the voluntary action of the legislatures themselves, may be predicted with some degree of confidence.

Proposed remedies

Some students of state government go so far as to advocate a popular referendum upon measures recommended by the governor which fail to pass the legislature; the governor might be given means of appealing to the electorate at his option, or all such measures might be referred automatically. A still more radical suggestion is that the governor be permitted, in cases of disagreement over important subjects of legislation, to dissolve the legislature and appeal to the voters for the election of a new legislature more in harmony with his program, much as the English prime minister is able to bring about a dissolution of the House of Commons, followed by an appeal to the country for a popular mandate.[2]

[1] J. M. Mathews, "The New Rôle of the Governor," *Amer. Polit. Sci. Rev.*, VI, 216-228 (May, 1912).

[2] F. W. Coker, "Interworkings of State Administration and Direct Legislation," *Annals Amer. Acad. of Polit. and Soc. Sci.*, LXIV, 122-133 (March, 1916). The "Model Constitution" prepared by the National Municipal League

Executive powers

Thus far our attention has been fixed upon the governor's relations with the law-making branch. His position as chief executive, however, calls equally for attention; after all, his primary function is executive. The first thing to be observed in this connection is that, although commonly charged with the duty of seeing that the laws are faithfully executed, the governor enjoys little or no inherent authority derived from the mere fact that he is the chief executive of the state. His position in relation to the state administration is therefore distinctly inferior to that of the president in relation to the national administration. The federal constitution broadly bestows "*the* executive power" of the United States upon the president; but no corresponding clause in state constitutions concentrates executive power in the governor, giving him an indefinite sphere of executive influence. On the contrary, the executive authority in state government is shared by a number of officers.

Restricted character

State constitutions frequently say expressly that the executive branch of the government shall consist of the governor, lieutenant-governor, and various other officers mentioned by title, and that merely the "supreme" [or chief] executive power belongs to the governor. Such provisions, combined with the tendency of the courts to construe grants of power in state constitutions rather narrowly, have left the governor with practically no executive authority which is not clearly granted by some definite provision in the constitution or by some statute.

In order fully and effectually to carry out the constitutional injunction to see that the laws are faithfully executed, the governor should have full control over the selection and the official acts of all of the subordinate state and local officials upon whom he is obliged to depend for the enforcement of these laws. In no state, however, is he given this power. On the contrary, such control as he wields in the several states is derived from a very limited power of appointment, from a right to supervise or direct some of the officials while they are in office, and from a restricted right of suspension and removal.

The power of appointment

The appointing power of the governor is derived both from the constitution and from statutes. In the constitution there is commonly a clause specifying certain officers whom the governor may appoint; although in most instances his constitutional appoint-

provides for a referendum of bills failing of passage, in case one-third of the members voted for them; also for a referendum of bills not approved by the governor. J. A. Fairlie, "The Executive in the Model State Constitution," *Nat. Mun. Rev.*, X, 226-232 (April, 1921).

ing power is derived from a general provision authorizing him to appoint all officers whose appointment or election is not otherwise provided for by the constitution or by the laws of the state. To other positions he appoints by virtue of direct statutory provision. The number of places which the governor may fill runs well into the hundreds in such states as New York, Pennsylvania, and Illinois; and it always tends to increase whenever the governor and the majority in the legislature belong to the same party, and tends to decrease whenever they belong to different parties.

However broad the governor's power of appointment, it seldom extends to the most important executive officers, commonly called the heads of executive departments, such as the secretary of state, the attorney-general, the treasurer, the auditor or comptroller, and the superintendent of public instruction. These officials are usually elected by the people, a practice which has been characterized as "a relic of the outworn idea that one-man power is dangerous, and that the heads of departments, instead of being the effective instrumentalities of the governor, should be checks upon him." That there should be some check upon the governor is perhaps true. But it should come from the other departments of the government, and from his responsibility to the people, and not from officers in his own department.[1]

Chosen independently of the governor, and for fixed terms, these principal executive officers may fail to coöperate with their nominal chief and are then in a position to embarrass him and to impair the efficiency with which the state's affairs are administered. Especially is this likely to be the case when one or more of these officers belong to a different political party or to a different faction in the same party from that of the governor. When all belong to the same party, the friction which inevitably tends to arise between officers who are legally independent of the governor and of each other may be avoided or greatly reduced and some measure of team-work insured through the harmonizing influence of party fellowship. Having their duties almost wholly prescribed by law, these state officials nowhere occupy the same relation of subordination toward the governor that the heads of the national executive departments occupy with respect to their chief; they never constitute a body of legal and political advisers to the governor corresponding to the president's cabinet.

[1] J. M. Mathews, *Principles of American State Administration*, 84.

Limitations on the appointing power

By far the greater part of the governor's appointing power arises in connection with the statutory boards and commissions which have appeared in great numbers in all of the states in recent decades. In filling these administrative offices, however, the governor seldom has a free hand; he must obtain confirmation of his appointments by an executive council or, more commonly, by the state senate—a requirement which is open to many of the objections which have been cogently urged against councilmanic confirmation of appointments by the mayor in our cities.[1] Other limitations, too, impair the effectiveness of the appointing power as a means of control over administrative officials, *e.g.*, civil service laws, laws prescribing specific qualifications for appointees, and especially laws fixing definite and overlapping terms, which often make it impossible for the governor to appoint a majority of the members of a board or commission during a single term of office. All of these provisions more or less restrict the governor's choice of the officials whose duty it is to assist him in the execution of the laws, and therefore tend to weaken his control over them. On the whole, the governor's power of appointment, especially where subject to senatorial confirmation, has not contributed materially to strengthen his position as the head of the state administration, and often has been a positive source of weakness.

The powers of direction and removal

The governor's control is farther lessened by the fact that he has little or no power of direction over the other executive and administrative officials, the reason being that most of their duties are prescribed in the statutes. Whatever power of direction he enjoys must ordinarily be derived from a specific grant in the constitution or the statutes, and a commendable tendency has recently appeared in some states to increase his authority in this respect. Of much greater importance as an agency of control is the governor's power to suspend or remove appointive officials, although this, too, is quite insignificant in comparison with the president's power of removal. Like the power of direction, the power of removal must generally be derived from some specific grant of authority in the constitution or statutes. Furthermore, the exercise of this power, when authorized, is often so hedged about as to be very ineffective. The principal elective state officials can, as a rule, be removed only by the cumbersome process of impeachment. Even when the governor is authorized to remove or

[1] See Chap. XLVI.

suspend them, an effective check upon the exercise of the power is imposed in a number of states through the requirement that removals must have the approval of the senate. In New York, for example, the principal elective state officials can be removed only by a two-thirds vote of all the members elected to the senate, a requirement which more than once has served to embarrass the governor and defeat the popular will. Over local officers the governor has, in most states, little or no control, although in New York, Michigan, Minnesota, Ohio, and Wisconsin he can remove certain of them.[1]

Miscellaneous powers

In addition to the legislative and executive powers here considered, the governor is clothed with certain miscellaneous powers, such as the control of the state militia, the granting of pardons and reprieves, and the calling of special elections to fill vacancies. He is also an *ex-officio* member of a large number of state boards and commissions, and is the medium through which official communications are carried on with other states and with the national government. Unfortunately, most of the governor's time is consumed in the performance of comparatively trifling ministerial duties instead of being devoted to an intensive study of the big problems in the fields of legislation and administration. A recent governor of New York testified that he was compelled to spend approximately seventy-five per cent of his time doing clerical work, signing papers, and listening to reports, matters which might well have been delegated to a competent subordinate.[2]

The lieutenant-governor

A lieutenant-governor is provided for in thirty-five state constitutions. In general, his functions are (1) to succeed the governor in the event of the latter's death, removal, absence, disability, or impeachment, and (2) to preside over the deliberations of the senate, and incidentally to have a casting vote in case of a tie (except in Michigan). In some states he has the right to participate in senate debates, to vote when the senate is in committee of the whole, and to serve *ex-officio* as a member of the governor's council.[3]

Other executive officers

Space permits only the barest summary of the duties of the other principal executive officers.[4] There is always a secretary of

[1] J. M. Mathews, *Principles of American State Administration*, 98-112.

[2] Alfred E. Smith, "How We Ruin Our Governors," *Nat. Mun. Rev.*, X, 277-280 (May, 1921).

[3] C. Kettleborough, "Powers of the Lieutenant-Governor," *Amer. Polit. Sci. Rev.*, XI, 88-92 (Feb., 1917). Executive councils exist only in Maine, New Hampshire, Massachusetts, and North Carolina.

[4] They are more fully discussed in Mathews, *op. cit.*, Chap. VI.

state, or secretary of the commonwealth, who is the custodian of the state archives and the state seal. He also has charge of the publication of the laws, countersigns the proclamations and commissions issued by the governor, issues certificates of incorporation to corporate bodies of various kinds, and performs a great variety of miscellaneous duties.

The treasurer is merely the custodian of the revenues and trust funds of the state, which he pays out for objects authorized by law only upon the order of the auditor or comptroller. This latter official has much greater power, for he not only audits the accounts of all state officers charged with the collection or disbursement of state funds, but passes in the first instance upon the legality of all expenditures. No money may be drawn from the public treasury without warrant previously issued by him.

The superintendent, or commissioner, of public instruction has charge of the larger educational interests of the state. He supervises the administration of the school laws, apportions the school funds among cities, townships, or school districts, conducts investigations, and makes reports to the governor and legislature concerning the public school system of the state.

The attorney-general, as the principal law officer of the state, prosecutes and defends all actions in which the state has an interest, gives legal advice to the governor and other principal state officers, and in some instances exercises supervision over the work of the county prosecuting attorneys.

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CHAPTER XXXIX

STATE ADMINISTRATION

We have seen that one of the most striking developments in government in recent times is the multiplication of activities undertaken, and the consequent expansion of administrative machinery.[1] Nowhere is this phenomenon more in evidence than in the American states; and in turning to consider how state administration is organized and carried on we may well fix attention mainly upon the extent of this expansion, the reasons for it, the results of it, the disadvantages which it entails, and some of the efforts which are being made to overcome them.

Growth of administrative agencies

State government in earlier days was a simple affair; a half-dozen principal officers, with small staffs of deputies or other assistants, met all executive and administrative needs. After the middle of the nineteenth century, however, functions began to be broadened, and from 1890, and especially 1900, virgin fields of investigation and control were rapidly occupied. In some instances the new machinery required was provided for in constitutional amendments, but in most cases it was created by statute; and the establishment of statutory boards and commissions became easily the most notable feature of state administrative development. From 1900 to 1909 inclusive, the number of boards, commissions, and other agencies created by the legislatures throughout the country averaged between one and two hundred a year; and although the tendency to establish new offices has recently been curbed somewhat, hardly a legislative session passes in any state without the authorization of at least one new administrative body. In 1913 the legislatures of thirty-five states created no less than 236, and in 1915 about 170, new agencies; only five legislatures in each of these years failed to establish at least one. Until very recently, hardly a state could be found which did not have at least two score of these administrative bodies or offices, and in Delaware the number was as high as 117 (1918), in Illinois about 130 (1917), in New York, 187 (1919), and in Massachusetts, 216 (1919).[2]

[1] See p. 27.

[2] L. A. Blue, "Recent Tendencies in State Administration," *Annals Amer.*

CHAP. XXXIX

Reasons for the increase

The reasons for this development are not far to seek. Some of the new agencies were created originally for the purpose of collecting and digesting information for the legislature as a basis for intelligent law-making on some highly complicated subject. Others have originated in a desire on the part of the legislature to evade or postpone the solution of some important question, which, therefore, has been turned over to a special board or commission. Not a few offices have been created mainly or solely with a view to enriching the "spoils" to be distributed as rewards for party services. Again, citizens interested in some project of reform urge the adoption of new work by the state government; and, instead of studying the existing machinery in order to determine whether the new function might not be properly handled by an existing office, they draw up a statute creating a new agency, and the legislature blindly passes it. Popular demand for more industrial and social-welfare legislation, and for more activity by the state government in promoting agriculture, has been especially productive in this way. Quite a number of new boards and offices, too, spring from the increasing tendency of the state in recent years to assume functions which originally were left to county, city, or town authorities. Lastly, the growth of insurance, banking, and other financial corporations, and of railways and other public service companies, together with the breakdown of the numerous attempts to regulate them by detailed legislative enactments, has resulted in creating boards or commissions in almost every state for the administration of laws designed to regulate such business enterprises. The establishment of these newer administrative agencies has in many instances had the very beneficial effect of securing the advantages of specialization in public affairs and the application of technical knowledge and skill to the regulation of complex social and industrial conditions.[1]

Acad. of Polit. and Soc. Sci., XVIII, 434-445 (1901); F. H. White, "The Growth and Future of State Boards and Commissions," *Polit. Sci. Quar.*, XVIII, 631-656 (Dec., 1903); J. S. Pardee, "Government Running Wild," *Outlook*, CXI, 618-622 (Nov. 10, 1915); H. J. Ford, "Reorganization of State Governments," *Acad. of Polit. Sci. Proceedings*, III, 30-36 (1913).

[1] Some of the new state functions partake more of the nature of business enterprises than of government, notably as they have been developed in North Dakota. See H. Gaston, *The Non-Partisan League* (New York, 1920); C. E. Russell, *The Story of the Non-Partisan League* (New York, 1920); A. A. Bruce, *The Non-Partisan League* (New York, 1921). Not a few other states, however, regarded as business concerns, own more property and employ more men and pay out more for labor and materials than any other enterprise operating wholly within their boundaries.

Principal groups of administrative activities

Once created—under whatever circumstances—each board or office has shown a tendency to magnify the importance of its activities, and to compete ever more successfully for appropriations for the continuance of its work. As a result, the administrative machinery of most of the states has come to embrace active and more or less costly agencies having to do with each of the following main groups of interests and activities: (1) the enforcement of regulatory laws affecting banks and other financial institutions, insurance companies, railroads, express companies, telephone, telegraph, lighting, street-railway, and other public service corporations; (2) sanitation and public health protection; (3) the enforcement of laws regulating the employment of women and children in industry, requiring proper sanitary arrangements and safety devices in industrial and mercantile establishments, and governing the administration of workingmen's compensation and industrial insurance laws and laws for the prevention and adjustment of labor disputes; (4) the supervision and coördination of the work of poor relief in cities, towns, villages, and counties, and the oversight and control of state institutions for the care of the insane, blind, deaf and dumb, and of state prisons and reformatories; (5) the supervision of public educational activities; (6) the assessment and collection of taxes, and the supervision, in some states, of the financial operations of certain units of local government; (7) the regulation of various callings and professions; (8) the organization and control of the state militia, and of the state police force in about a dozen states;[1] (9) the development of better methods of raising and marketing crops, the breeding of improved grades of stock, and the general encouragement of rural industry and the enrichment of country life; (10) the conservation and development of forest, mineral, water-power, and other natural resources; and (11) the construction, operation, and maintenance of public works, including state buildings, highways, canals, and parks.

Defects in state administration

The rising tide of expenditures in the past few years entailed by these multiform administrative activities has prompted searching investigations and illuminating reports by commissions on economy

[1] The organization of state police forces is one of the most recent and interesting developments in the field of state administration. The best examples of such systems are to be found in Pennsylvania, New York, and Michigan. See P. O. Ray, "Report on State Police," *Jour. of Criminal Law and Criminology*, XI, 453-467 (Nov., 1920).

CHAP. XXXIX

and efficiency in about a third of the states.[1] The main purpose of these inquiries has been to ascertain which, if any, of the numerous administrative agencies were unnecessary; which, if any, might profitably be combined; and in what other ways a greater degree of economy and efficiency might be introduced into the administrative branches of the state government. In almost every instance, the reports of these commissions have amounted to a severe indictment of the existing state administration as unscientific, uneconomical, and inefficient. The most important specific defects upon which the indictment is based may be summarized as follows:

1. Lack of uniformity in organization:

(a) elective or appointive positions

There is the utmost lack of uniformity in the methods by which the members of these various administrative agencies are selected, in the length of their terms, in the ways provided for their removal from office, and in the standards of compensation. In New York, for example, in 1919, seven of the 187 principal state administrative positions were filled by popular election, seven by the legislature, fifteen by appointment by the governor; while fourteen were *ex-officio* bodies, seventeen were partly *ex-officio* and partly appointed by the governor, sixty-eight were appointed by the governor and senate, and the remainder were constituted in a bewildering variety of ways.[2]

(b) bi-partisan boards

Many state boards and commissions are called non-partisan when in reality they are bi-partisan, consisting of persons belonging to the two major political parties. Representation of the principal minority party upon these boards or commissions was originally intended to serve as a check upon the majority party and to mitigate the evils of partisanship in administration. In actual practice, however, this arrangement often results in bi-partisan agreements concerning the distribution of patronage attached to the office, in a division of responsibility for the character of the work performed, and in warding off threatened investigations which might prove equally damaging to the two parties represented on

[1] The best examples of such reports are those of the Illinois Committee on Efficiency and Economy (Springfield, 1915), the Massachusetts Commission on Economy and Efficiency (Boston, 1914), and the New York Reconstruction Committee (Albany, 1919). Other discussions along the same lines are J. L. Donaldson, "State Administration in Maryland," in *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXIV (1916); Griffenhagen and associates, *A Plan for the Administrative Consolidation of Maryland* (Baltimore, 1921); *Municipal Research*, No. 61 (1915), and No. 90 (1917). See also *Amer. Polit. Sci. Rev.*, VIII, 431-436 (Aug., 1914); IX, 252, 304, 317-322 (May, 1915); X, 557-563 (Aug., 1916); and XII, 510-514 (Aug., 1918).

[2] See charts accompanying the *Report* of the Committee on Reconstruction (1919).

the board. Ordinarily much better results might be expected if all members of such boards belonged to the same party, thereby concentrating the responsibility for good or bad administration and putting the dominant party on its mettle. Such an arrangement, however, does not appeal to the ordinary politician, who appears to have an instinctive dread of being placed in a position where he must shoulder all the blame for whatever may go wrong in public administration.

(c) term

The term of some of the administrative officers is definitely fixed by law and coincides with that of the governor; in the case of others, there is a fixed term which does not coincide with that of the governor; while in still other instances the term is left more or less indefinite.

(d) removals

There is likewise no uniformity in the methods provided for the removal of administrative officials. Impeachment by the lower branch of the legislature, followed by trial and conviction before the senate, is authorized in most states for the most important state officers; but this is a cumbersome method, seldom made use of. In New York there are, besides the process of impeachment, no fewer than seven distinct ways of removing department heads and other principal officials; less than one-half can be removed by the governor upon his individual responsibility. In other states the situation is not essentially different.[1]

(e) compensation

Some of the administrative officers of the state are paid a fixed salary; others receive no salary, but are paid by the day or by fees; while still others are allowed only their actual expenses while performing their official duties.

(f) spoils system

Subordinate positions attached to the various administrative departments and public institutions, aggregating more than ten thousand in Massachusetts and over eighteen thousand in New York, are generally distributed among the political and personal friends of the officers or members of the several boards and commissions in accordance with the well known principles of the spoils system; and this fact goes far toward explaining the inefficiency with which many state functions are performed when judged by the standards prevailing in private business enterprises. Since the enactment of the national civil service law in 1883, attempts have been made in a number of states to uproot the deeply entrenched spoils system by the adoption of civil service laws under which varying numbers of the subordinate employees of the state

State civil service reform

[1] A. N. Holcombe, *State Government in the United States*, 319.

CHAP. XXXIX

are appointed only after passing some sort of a competitive examination designed to bring out the comparative qualifications of the various candidates. New York and Massachusetts took this step in 1883 and 1884. But for more than twenty years they stood alone; everywhere else the spoils system held full sway until 1905, when Wisconsin and Illinois, and 1907, when Colorado and New Jersey, put a merit law into operation. These states were followed in 1913 by California, Connecticut, and Ohio, in 1915 by Kansas and Louisiana, and in 1920 by Maryland. In three states (New York, Colorado, and Ohio) the state constitution requires the enactment of civil service laws embodying the merit principle,[1] but elsewhere the merit plan rests entirely upon statutes which may be repealed at any time or so amended as to restrict its application to comparatively few employees.[2]

Essential features of the merit system

The merit system is founded on the principle that public office is a public trust, which should be bestowed only upon persons of proved fitness. It assumes that the public is entitled to reasonable qualifications on the part of its servants, and that these can, in a vast majority of cases, be ascertained by a properly devised and fairly administered system of competitive examinations, open to all applicants. It aims to prevent promotions or dismissals, for merely personal or political reasons, of public employees selected in this manner, and to establish the rule that removals shall be made only for legitimate causes, such as dishonesty, negligence, and inefficiency. The system ought, therefore, to be made to apply, not only to the appointment, but also to the promotion and removal, of practically all non-policy-determining subordinate positions connected with the state administration.

Civil service commissions

Civil service laws are usually administered by bi-partisan civil service commissions, appointed by the governor and senate. Not infrequently it has happened that a governor who was hostile to the merit system, or at all events out of sympathy with it, has appointed commissioners whose administration of the law has been

[1] Colorado has had two constitutional amendments on civil service; the last, in 1918, is much more stringent than the earlier one. See S. H. Ordway, "The Civil Service Clause in the Constitution," *Acad. Polit. Sci. Proceedings*, V, 251-262 (1914).

[2] A convenient summary of most of the state civil service laws will be found in *Ill. Committee on Efficiency and Economy Report* (1915), 911 ff. See also Mathews, *Principles of American State Administration*, Chap. IX; A. S. Faught, "A Review of the Civil Service Laws of the United States," *Nat. Mun. Rev.*, III, 316-326 (April, 1914); *ibid.*, VIII, 275-278 (June, 1919). For extended list of references on civil service reform, see P. O. Ray, *Introduction to Political Parties and Practical Politics* (rev. ed., New York, 1917), Chap. XV.

much like the work of a wrecking crew deliberately setting out to make the system a farce. In Massachusetts and in Maryland responsibility in this matter has been concentrated in a single commissioner or department head. But regardless of how well the authorities enforce both the letter and the spirit of the law, as it stands, they are too often handicapped by the terms of the law itself and by their own lack of energy and vision. If civil service commissions are to be a large constructive force in public administration, they must not confine their activities to the preparation and conduct of competitive examinations, but must exert a positive influence in such matters as compensation, promotion, hours of service, and retirement pensions;[1] in other words, they must interest themselves in everything that touches the welfare of both the employee and the state in their dealings one with the other. As "the personnel division of the state corporation," the civil service commission should spare no effort to enlarge the opportunities for self-improvement on the part of the employees under its jurisdiction.[2]

2. Improper functional division and inadequate correlation

Not only are the administrative agencies of practically all of the states seriously defective on their structural side, but numerous faults appear in the division of functions among them, and in their relations one with another. In general, there has been little effort to correlate them; and, instead of finding similar or clearly related functions combined in a single administrative office, the commissions on economy and efficiency have almost uniformly reported a most unfortunate division of related duties and activities among two or more boards, commissions, or officers, who do their work quite independently of each other and of any central directing and controlling officer. Harmonious coöperation—in other words, teamwork—is rare and more or less accidental; offices and activities are needlessly duplicated, resulting in both inefficiency and added expense.

In Illinois, for example, before the adoption of the reforms embodied in the civil administrative code of 1917, there were sep-

[1] New Jersey has recently enacted a retiring pension system for members of the state civil service. See P. Studensky, "A Sound Pension System for New Jersey State Employees," *Nat. Mun. Rev.*, X, 394 (July, 1921). On the general subject of retirement pensions, see Lewis Meriam, *Principles Governing the Retirement of Public Employees* (New York, 1918).

[2] Such opportunities have been provided by the University of Wisconsin in coöperation with the state civil service commission, and plans along similar lines have recently been put into operation by the New Jersey state civil service commission. These are briefly described in the New York *Evening Post*, September 11, 1920.

CHAP. XXXIX

arate boards for each penitentiary and reformatory, half a dozen boards dealing with agricultural interests, almost a score of more or less independent state agencies having to do with labor and mining, a series of distinct departments dealing with corporations of one kind or another, a number of boards working in the interest of public health, numerous uncorrelated educational agencies; while even a single finance department could hardly be said to exist when duties relating to state finance were divided among the governor, the treasurer, the auditor, the attorney-general, the secretary of state, the insurance commissioner, and other officers. Overlapping functions, and sometimes needlessly duplicated offices, were conspicuous in the inspectorial work carried on by some of the state departments: inspectors from the health department, from the food commission, and from the department of factory inspection might visit the same places at different times for much the same purpose and give conflicting orders, when one visit by a single set of inspectors would have been sufficient.[1]

3. Inadequate unifying and directing authority

Over the scores of administrative agents, boards, and commissions there is, as a rule, no unifying or coördinating, and only very slight directing or supervisory, control. A proper degree of responsibility to the governor, to the legislature, or to the people is almost everywhere lacking. Elective officers are practically independent one of another, and of the chief executive of the state as well; and the control of the governor over the appointive agencies is usually slight. With no single officer responsible for the proper functioning of the organs of state administration, it is not surprising to find the different administrative agencies looking after their legislative needs quite independently and sometimes urging the enactment of measures which are in direct conflict. The public is accustomed to hold the governor responsible

[1] Mathews, *Principles of American State Administration*, 169-170. In New York, in 1919, there were five departments and numerous independent boards having authority over the custody of state parks, reserves, and places of interest; more than seven departments assessing and collecting taxes; more than ten departments, boards, and commissions for state correctional and charitable institutions. Legal functions were scattered through ten departments besides that of the attorney-general; and there were numerous uncorrelated educational agencies. *Committee on Reconstruction Report* (1919), 7. Before recent changes in Michigan, "responsibility and authority for dealing with state financial problems had been distributed among every elected state official and board except the lieutenant-governor. Thirty authorities divided responsibility with the governor in administering state welfare work. Problems relating to trade and commerce were divided among thirteen authorities. Education and related questions were dealt with by five elected officials and twenty-seven other authorities. . . ." L. D. Upson, "Unscrambling Michigan's Government," *Nat. Mun. Rev.*, X, 361-362 (July, 1921).

for the success or the shortcomings of the state administration, when in reality he can exercise little or no effective control over so large a number of administrative agencies, selected in such diverse ways, serving for such varying terms, and rarely removable by his independent action. Under the circumstances that exist "it is manifest that the governor does not govern, that he cannot govern, however serious his intentions to do so may be. Indeed, the whole administrative system on its legal and official side seems definitely calculated to prevent his governing."

Unity imparted only by the "machine"

Whatever unifying and harmonizing force there is comes, in many states, from the outside, being exerted by the "invisible government" of political organizations. "Here," in striking contrast to the state administrative system itself, "is leadership, here is a directing will, here is organization in such perfection that it is commonly spoken of as 'the organization' or 'the machine,' and these terms are descriptive." In these organizations "there are no loose ends, no irresponsible agents, no scattered bureaus and commissions. From the head downward authority is clearly defined, obedience is punctiliously exacted, the hierarchy is closely interlinked, complete, effective." In a few states "its work is manifest in all parts of the government; its hand guides every public act," although the public interest is rarely the dominant motive.[1]

4. Costliness of state administration:

The uneconomical character of state administration is partly traceable to the unscientific way in which it is organized, as indicated in the preceding pages. Other causes are to be found in the general absence of a modern or uniform system of accounting for the different executive departments and administrative boards and commissions; and especially in the absence, until very recently, of any arrangement for centralized purchasing of supplies and materials used by the various state offices and institutions. As in county and city administration, it has been the almost uniform practice to allow each state department or institution to purchase its own materials and supplies, subject to certain statutory regulations. For this disjointed and needlessly expensive system, centralized purchasing substitutes a purchasing bureau or agent to attend to these matters for the different administrative units.

(a) lack of proper accounting and purchasing methods

[1] E. Dawson, "The Invisible Government and Administrative Efficiency," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXIV, 11-30 (March, 1916). See also in this connection Elihu Root's address to the New York constitutional convention of 1915 entitled "Invisible Government," *Rev. of Revs.*, LII, 465-467 (Oct., 1915).

CHAP. XXXIX

There are, of course, limits to the economies which can reasonably be expected from centralized purchasing, but there is no doubt that a great saving might be effected by its wider adoption, as the experience of the dozen states where the system has been tried abundantly proves.[1]

(b) lack of a responsible budget-making authority

The high and increasing cost of state administration is also traceable to the lack of a central agency or authority whose duty it is to study the financial needs of the various administrative departments, to collect and revise the estimates submitted by the several departments, and to prepare and submit for legislative consideration a definite and specific schedule of appropriations needed to insure the proper performance of the administrative functions of the state without waste or extravagance. In the lack of a carefully prepared budget covering all phases of state administration, the independent and uncorrelated officers, boards, and commissions are found vigorously competing one with another before the legislature, each striving to obtain the most generous appropriations possible, without reference to the needs of the others, and without much reference to the probable revenues of the state. Furthermore, there has been no effective centralized control over the expenditure of appropriations thus obtained; whence has arisen still farther waste and extravagance.

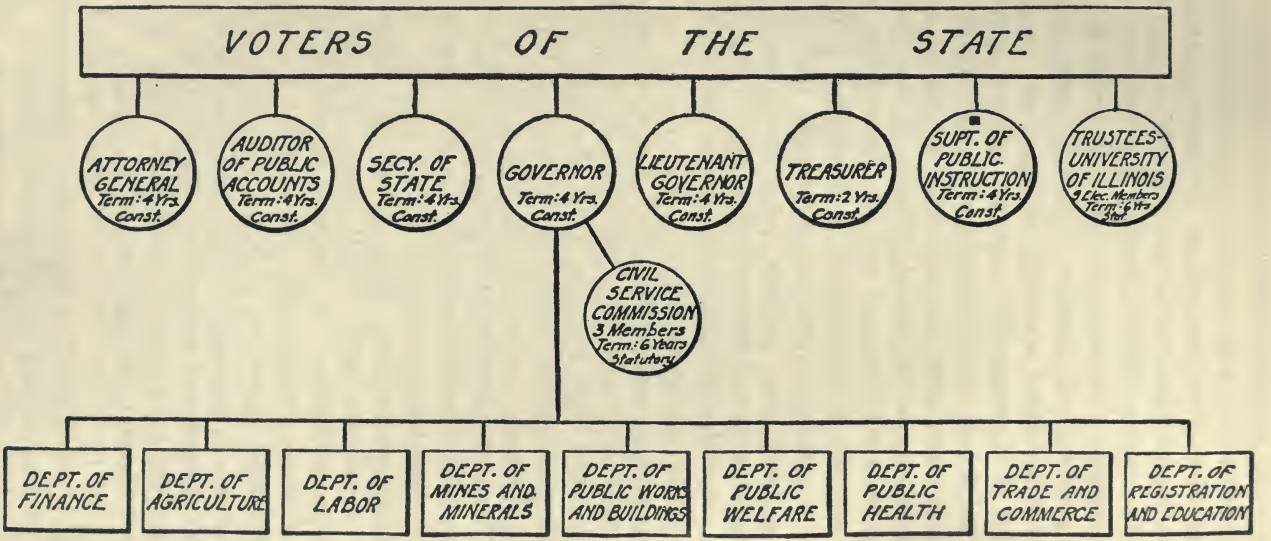
Movement for reform of state administration

Besides bringing to light these fundamental defects of state administration, the reports of economy and efficiency commissions have usually embodied certain definite suggestions and recommendations for a reorganization of the state administrative services; and these proposals have formed a starting-point for the movement for administrative consolidation which has developed in about a dozen states since 1916.[2] By administrative consolidation is meant, chiefly, (1) reorganization of the numerous administrative offices into a few coördinated departments with heads; (2) authorization of the governor to appoint these department heads, who become directly responsible to him and serve as his cabinet; and (3) careful adjustment of the terms of department heads with reference

[1] These states are Alabama, California, Idaho, Illinois, Michigan, New Hampshire, New Jersey, New York, Ohio, Texas, Vermont, and Wyoming. On the subject of centralized purchasing, see A. G. Thomas, *Principles of Governmental Purchasing* (New York, 1919); A. E. Buck, "The Coming of Centralized Purchasing," *Nat. Mun. Rev.*, Supplement, IX, 117 ff (1920).

[2] Excellent summaries of this movement are to be found in the *New York Committee on Reconstruction Report* (1919), 233 ff, and A. E. Buck, "Administrative Consolidation in State Government," *Nat. Mun. Rev.*, Supplement, VIII, 639 ff (Nov., 1919).

ADMINISTRATIVE ORGANIZATION IN ILLINOIS IN 1920



Courtesy of the *National Municipal Review*

CHAP. XXXIX

to the term of the governor. The object is, manifestly, to concentrate in the governor a real, not merely a nominal, responsibility for the state administration—such as the president bears in relation to national administration—and to introduce a degree of unity, efficiency, and economy which at present is unknown in most states. Such administrative reorganization naturally demands (1) a careful grouping of related functions under the same departmental management, based upon a careful survey of all the administrative activities of the state; (2) a proper internal organization of each department, *i.e.,* the sub-division of each department into divisions or bureaus, each with its chief responsible to the head of the department, and a logical division of departmental work among the several subdivisions; and (3) the abolition of unnecessary offices and the discontinuance of duplicated activities. Administrative consolidation does not necessarily include reform in accounting and budgetary methods, but it is a prerequisite for the successful introduction of these reforms, and in the plans of administrative consolidation adopted in Illinois, Idaho, and Nebraska the two things have gone together.

Essentials of effective reorganization

Illinois civil administrative code

After some unsuccessful efforts to bring about administrative reorganization in Oregon in 1909 and 1911, in Minnesota in 1913, and in Iowa and New York in 1915, the first comprehensive plan was adopted by the Illinois legislature of 1917, following a careful preliminary survey of all the state's administrative agencies. The civil administrative code, which embodies the reform, abolished over one hundred statutory offices, boards, and commissions and consolidated their functions in nine departments, namely, finance, agriculture, labor, mines and minerals, public works, public welfare, public health, trade and commerce, and registration and education. At the head of each of these departments is a director appointed by the governor and senate for a term of four years coinciding with the governor's term. Under each director are an assistant director and heads of bureaus, also appointed by the governor and senate, although under the immediate control of the head of the department. Each department is authorized to appoint its own employees, subject to the civil service rules of the state. Whenever quasi-legislative or quasi-judicial duties are included in the work of a department, special boards have been provided to perform such functions. The members of these boards are appointed by the governor; and although such boards are not subject to the direction, supervision, or con-

trol of the director of any department, they are component parts of the department to which they are attached and are under the general fiscal supervision of the director of finance. Boards of an advisory character are also provided for in the departments of agriculture, labor, public works, public welfare, public health, and registration and education. Their members, serving without pay, assist and advise the governor and directors in determining questions of policy. Provision is also made in this code for a centralized purchasing system for the departments, for a uniform accounting system, and for an improved executive budget system.

Constitutional amendments essential to complete reorganization

The work of administrative consolidation in Illinois was carried almost as far as the legislature could go without amendments to the constitution. Nevertheless, certain important executive officers and administrative agencies have not been affected by the new code: neither the constitutional nor the statutory duties of the seven constitutional executive officers have been changed; and more than twenty independent statutory boards, commissions, or offices remain outside of the nine code departments, less than half of them being filled by appointment by the governor. Here, as in all other states, complete administrative consolidation, which will centralize responsibility for administration in the governor, as it is now centralized, in the national sphere, in the president, must await numerous constitutional amendments. The Illinois civil administrative code has, nevertheless, gone farther than legislation in any other state in the direction of introducing a scientific and efficient form of administrative organization in the state government.[1]

Reorganization in other states

The example thus set was largely responsible for the adoption two years later of similar, although much less comprehensive, plans of administrative reorganization in Idaho, where over fifty administrative agencies were consolidated in nine departments; in Nebraska, where eighty-two departments and agencies were reduced to six administrative departments, six constitutional officers, and four constitutional boards; and in Massachusetts, where more than two hundred administrative agencies were re-grouped in twenty departments, four of which are presided over by constitutional officers, and the other sixteen by heads appointed by the governor

[1] For farther details of the Illinois civil administrative code, see J. M. Mathews, "Administrative Reorganization in Illinois," *Nat. Mun. Rev.*, Supplement, X, 739 ff. (Nov., 1920); J. A. Fairlie, "Illinois Administrative Code," *Amer. Polit. Sci. Rev.*, XI, 310-315 (May, 1917); F. O. Lowden, "Problems of Civil Administration," *No. Amer. Rev.*, CCX, 186-192 (Aug., 1919).

and council. In 1921 similar, although less extensive, reorganizations were authorized in Ohio, Missouri, Washington, and California.[1] In New York, Oregon, and Delaware also, commissions on economy and efficiency have recently submitted plans for administrative consolidation, similar to the Illinois code; and the governors of Indiana, Vermont, Michigan, Minnesota, Nevada, and North Dakota in 1919 recommended the same steps to their respective legislatures.

Reorganization essential to genuinely democratic state government

If, with properly constructed machinery, state administration is not more efficient and more economical than under the present system with its endless incongruities, absurdities, and lack of coordination, the fault will lie chiefly with the governor and the character of his appointees; and the public will be in a position to assign the blame intelligently, since the system will be far more understandable by the average citizen than it is to-day. Few people, and then only after long and painstaking study, can really comprehend the intricate network of departments, offices, boards, and commissions which, until recently, has everywhere formed the administrative branch of state government. "Democracy," as the New York Reconstruction Commission of 1919 truly said, "does not merely mean periodical elections. It means a government held accountable to the people between elections. In order that the people may hold their government to account, they must have a government that they can understand." The movement for administrative consolidation is, therefore, one more important step toward making our state governments more genuinely democratic; the reconstruction which is contemplated, when fully carried out, will mean the clearing away of a jungle whose devious bypaths have hitherto been the haunts of the spoilsman and the grafter.

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[1] The following articles will place the student in possession of the principal facts connected with the most recent administrative changes: in Idaho, *Nat. Mun. Rev.*, VIII, 615-620 (Nov., 1919); in Nebraska, *Rev. of Revs.*, LXI, 295-302 (March, 1920); in Washington, *Nat. Mun. Rev.*, X, 334-336 (June, 1921); in California, *ibid.*, X, 393 (July, 1921); in Ohio, *Amer. Polit. Sci. Rev.*, XV, 380-383 (Aug., 1921); in Missouri, *ibid.*, XV, 383-384 (Aug., 1921).

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CHAPTER XL

STATE FINANCE

How to obtain the money requisite to carry on the numerous and varied activities mentioned in the preceding chapter, how to apportion the state's revenues among the different administrative enterprises and agencies, how to set and maintain the necessary safeguards against waste and corruption, how to limit the state's borrowing power, if at all, and how to link up state finances, in the narrower sense, with the finances of counties, towns, and other local government areas—these are problems second in importance and difficulty to none which we have thus far encountered in the field of state government. Certain of them, notably those pertaining directly to the raising and spending of money, call for some study at this point.[1]

Sources of state revenue

With respect to sources of revenue, it is not surprising to find marked differences among the forty-eight states; nor to discover that, in view of the steadily increasing cost of state government, almost every state has been obliged not only to increase the amounts derived from old sources of revenue but to cast about for new ones. In general, the revenues of the states are now somewhat as follows:

(1) Commercial revenues, or income from public property, including revenue obtained by methods and under conditions which are very similar to those prevailing in private enterprises; for example, rents from school lands (especially in the western states), from state-owned canals, docks, or wharves, and from industries carried on in penal institutions.

(2) Fees charged for inspections, charters of incorporation, franchises, automobile licenses, and licenses to conduct a business or practice a profession.

(3) Income accruing from a variety of legal proceedings, such

[1] The constitutional limitations on taxation and indebtedness have been summarized above (Chap. xxxv). On these phases of state finance, see H. Secrist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Univ. of Wis. Bull.*, VIII, No. 1 (1914).

as fines in criminal cases, the forfeiture of bonds, and charges for filing, copying, or recording legal documents.

(4) Subventions or grants by the national government in aid of state activities, notably education and highway construction.[1]

(5) Taxes. Large as are the sums obtained in many states from the foregoing sources, by far the greatest amount of revenue is derived from taxation.[2]

Different kinds of taxes

The most productive kinds of taxation, one or more being found in every state, are the following: (a) corporation taxes, which may assume any one of a variety of forms, such as a tax on capital stock, real estate, trackage, franchises, "corporate excess,"[3] gross earnings or net earnings, or the gross production or net proceeds of oil-wells and mines;[4] (b) inheritance taxes, which are now found in about forty states, and usually take the form of graduated or progressive taxes applied to both direct and collateral inheritances, although in some states only the latter are taxed; (c) income taxes, which have rapidly come into favor since the adoption of the federal income tax amendment in 1913 and the introduction of improved methods of collection; (d) business and professional taxes, applied to both persons and corporations, which form an important source of revenue in Pennsylvania, Delaware, and a few western states, but are more commonly found in southern states; and (e) the general property tax, which is the main reliance of the majority of states, and which furnishes probably more than half of the income of every state in which it is used for state purposes.[5] Because of its widespread use, the outspoken dissatisfac-

[1] J. A. Lapp, "Federal Grants in Aid," *Amer. Polit. Sci. Rev.*, X, 738-743 (Nov., 1916).

[2] In general, it may be said that a state has the right to tax all persons, including corporations, residing or doing business within its bounds, and all forms of property located within the state, except in so far as this right may be restricted by provisions in the state constitution. To this generalization, however, there are important exceptions. For example, states may not tax imports from foreign countries, interstate commerce, or the agencies, instrumentalities, or property of the national government. J. T. Young, *The New American Government and Its Work*, Chap. xxv.

[3] "The corporate excess is the remainder found by deducting the assessed value of the tangible property from the equalized market or actual value of the capital stock, plus bonded indebtedness." J. M. Mathews, *Principles of American State Administration*, 250.

[4] Educational, charitable, and religious corporations are almost always exempted, in whole or in part, from the taxes which are imposed upon corporations organized for profit.

[5] In some states certain sources of revenue have been set aside for taxation for state purposes and other sources have been reserved for local taxation. "The principal sources reserved for state taxation are banks, insurance companies, public service corporations, inheritances, and incomes." In New York and Pennsylvania and a few other states the amount of revenue derived from

CHAP. XL

tion with it in many states, and its intimate relation to almost every main problem of tax reform, the general property tax calls for somewhat detailed consideration.[1]

Theory of the general property tax

This tax is an *ad valorem* levy upon real estate and upon both tangible and intangible personal property. Its original purpose was to spread the public burden as equitably as possible over all persons in accordance with their respective abilities to contribute, measured by the value of the property they owned. Its history goes back to a period in which men were profoundly influenced by a political philosophy which insisted upon the strict equality of all men before the law. It was assumed that the natural equality of men extended not only to their persons but to their property, so that it was regarded as an act of discrimination and fundamental injustice to tax one form of property at a different rate from another.

Objectionable features

In early times the application of this theory worked no real injustice. Houses and lands could not, of course, be concealed; and practically all personal property was tangible, consisting mainly of horses, cattle, wagons, farm implements, tools, grain, merchandise, and household furniture. All these could be easily located and their value determined by the tax assessor; so that comparatively little, if any, taxable property escaped paying its just share. In the past seventy years, however, there has been an enormous increase in the amount and variety of intangible personal property, especially in the form of stocks, bonds, and mortgages; so that, taking the country as a whole, the value of intangibles is now greatly in excess of the value of real property

sources set aside as special objects of state taxation has been so large as to render almost wholly unnecessary any direct property tax for state purposes. Mathews, *op. cit.*, 263-264. There has also been much discussion in recent years among students of public finance of the desirability of a similar differentiation of the objects of state and national taxation. In 1917 representatives of forty-two states met at Atlanta to propose measures for recommendation to Congress along this line. On this general subject, see E. R. A. Seligman, *Essays in Taxation* (8th ed., New York, 1913), Chap. XII; *Annals Amer. Acad. Polit. and Social Sci.*, LVIII, 1-11, 59-64, 105-111 (March, 1915); *Nat'l Tax Assoc. Proceedings* (1919), 128-145; J. E. Boyle, "A Program for Redistributing Sources of Revenue as between Cities, States, and National Government," *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 272-276 (May, 1921).

[1] Brief discussions of the general subjects of state revenue and taxation will be found in Mathews, *Principles of American State Administration*, Chaps. X-XI; Young, *The New American Government and Its Work*, Chaps. XXII, XXV; *Ill. Const. Conv. Bull.* No. 4 (1920), "State and Local Finance." See also A. Youngman, "The Revenue System of Kentucky; A Study in State Finance," *Quar. Jour. Econ.*, XXXII, 142-205 (Nov., 1917), and M. L. Faust, "Sources of Revenue of the States, with Special Study of the Revenue Sources of Pennsylvania," *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 113-122 (May, 1921).

subject to taxation. These newer forms of personal property are easily concealed, and the owner has every temptation to conceal them when the rate of taxation, determined primarily with reference to real estate and tangible personal property, would compel him to yield up in taxes from one-fourth to one-half, or even more, of the net income derived from these securities—a result which really amounts to confiscation.

Under present conditions, the uniform general property tax in many states is neither uniform nor general nor equitable. Real property comes the nearest to bearing its fair share of taxation, but even here there is often the greatest lack of uniformity in the valuations placed upon the same class of real estate located in different parts of the same state, and even within the same county. Personal property, on the other hand, either is notoriously undervalued or escapes taxation altogether. For example, in Chicago, the second largest city in the western hemisphere, the full cash value of all the diamonds and jewelry owned was, according to the assessment figures for 1911, the ridiculously low sum of about a half-million dollars. Furthermore, the same tax returns indicated that not a single organ or melodeon was owned within the city limits, and that only one person in every 188 possessed a watch or a clock! Almost ten million hogs, five million sheep, and four million cattle were received and sold in the Chicago markets during the year 1913; yet the tax records show that in the whole of Cook county there were assessed for taxation only 26,500 cattle, 683 sheep, and 8,085 hogs. These records also show that the grain elevators and warehouses of Chicago held in storage on the first day of April, 1918, grain having an assessed value of only $779,644, whereas the actual market value of the millions of bushels held in storage on that date was $17,778,700.[1]

Self-assessment by owners of personal property

In many communities the assessment of personal property taxes is almost wholly restricted to those persons whose names are on the assessment rolls as the owners of taxable real estate. It is, of course, physically impossible for the tax authorities to assess all tangible personal property from actual view; hence it has become customary in many places to require the taxpayers themselves to make out sworn statements of their taxable property, a method

[1] Report of the Sub-Committee of the Revenue Committee of the Illinois House of Representatives (1918). See also Mathews, *op. cit.*, 226-227; R. M. Haig, "History of the General Property Tax in Illinois," *Univ. of Ill. Studies*, III; J. A. Fairlie, *Report on the Taxation and Revenue System of Illinois* (1910); *Ill. Const. Conv. Bull.*, "Constitutional Conventions in Illinois" (1920), 76-89; *ibid.*, "State and Local Finance" (1920).

which practically amounts to self-assessment. Under such circumstances, instead of being equal in proportion to ability to pay, the tax becomes progressive in proportion to the honesty of the taxpayer in making out his tax-list. "It thus places a premium on dishonesty and has been justly described as a 'school of perjury.'" The upshot is that personal property everywhere fails to bear its proportionate share of the burden of taxation. "The figures of the United States census bureau show that in 1912 the assessed value of real property and improvements subject to *ad valorem* taxation was, for the entire country, about fifty-two billions of dollars, while that of personal property was only about seventeen billions, though the true value of personal property was doubtless considerably greater than that of real estate."

Substitutes for the general property tax

The foregoing statements indicate in a very general way some of the principal reasons why, in many states, the general property tax has come to be regarded, in the past fifteen or twenty years, as thoroughly unsatisfactory. New York has abandoned it as a source of state revenue, and, among other substitutes, has adopted certain forms of taxation which, like the mortgage-recording and bond-registry taxes, are specially designed to induce the owners of intangibles to report them for the purposes of taxation at a reasonably low rate. In over thirty other states, those defects of the general property tax which are traceable to the uniformity requirement have been greatly reduced, and to a considerable extent eliminated, by express or implied constitutional grants of authority to the legislature to classify different kinds of property and to impose a different rate of taxation upon the various classes, provided the tax is uniform for all property falling within any given class. This classification system makes it possible, among other things, to impose a lower and more equitable rate upon intangibles than upon real estate, with the result that, the motive for concealing such property from the assessors being removed, vastly larger amounts are reported annually for taxation, with a consequent heavy increase in the revenue of the state from this source. This plan of taxing securities at a lower rate has been adopted in Pennsylvania, Maryland, Iowa, Minnesota, Rhode Island, North Dakota, and other states, with generally far more satisfactory results than were obtained under the old uniform tax.[1] On the whole, however, the movement for tax reform has

[1] *Ill. Const. Conv. Bull.*, "Constitutional Conventions in Illinois" (1920), 76 ff. See also Fifth Annual Conference on State and Local Taxation, *Ad-*

progressed rather slowly, partly because of the fact that many people are able or willing to see only the theory upon which the general property tax is founded, rather than its actual operations; partly because of restrictions which prevent modification of the system without constitutional amendment;[1] and, lastly, because of the feeling of certain persons or classes of persons that any change in the system of taxation would affect their private interests adversely.

Why tax-reform moves slowly

Not all of the defects connected with the general property tax, however, are inherent in the nature of the tax; some arise out of the methods by which the tax is assessed, and where these methods have been improved, in one or more of the ways indicated below, popular dissatisfaction with the system has to some extent abated.

Methods of assessment

The methods of levying and collecting the tax are, in their more fundamental features, the same in all of the states. The property is valued by a local assessor of the town, township, or county, as the case may be, and the same assessment lists are used as the basis of state, county, and municipal taxation. Assessments of personal property are often made annually; those of real estate, usually not more frequently than once in three or four years. All property is supposed to be assessed either at its full market value or at some specified percentage thereof. In Illinois, for example, the basis of assessment was for a long time one-third of the real value; but this has recently been increased to one-half. Although the work of assessing property for purposes of taxation is of the greatest importance, and ought to be done in accordance with scientific principles and methods, it is, as a rule, rather poorly performed. A main reason is that the assessors are commonly elective officials with no training which qualifies them to weigh the many factors entering into the determination of property values. "Much of what they do is mere guesswork."

Inefficient assessors

dresses and Proceedings, V, 333-343, "Report of Committee on Practicable Substitutes for the General Property Tax."

[1] Constitutional amendments relating to taxation have been proposed in large and increasing numbers since 1900. Between 1900 and 1918, 257 amendments on taxation were submitted to popular vote, of which 141 were adopted and 116 failed. This movement has been widespread; one or more amendments have been submitted in all but six states, *i.e.*, Vermont, Connecticut, Rhode Island, Delaware, New Jersey, and Indiana. *Ill. Const. Conv. Bull.,* No. 4 (1920), "State and Local Finance," 249. In 1920 constitutional amendments relating to taxation or finance were voted on in twelve states, eighteen being adopted and eight defeated. In 1922 ten amendments relating to taxation will be voted on in eight states. See W. E. Hannan, "State Tax Legislation in 1921," *Amer. Polit. Sci. Rev.,* XVI, 53-73 (Feb., 1922).

Equalization of assessments

In property assessments under such circumstances there inevitably appear great inequalities in the work of local assessors in the different parts of a state, and even in their work in different parts of the same county. To correct, in some measure, these inequalities, there is in a few states, immediately above the local assessor, a township board of review with power to increase or decrease individual assessments. Above this local board, or above the local assessors, there is usually a county board of review, or some officer, like the county treasurer, whose duty it is to equalize the aggregate assessment of the townships or other taxing districts within the county, and who may also usually change individual assessments. These county and other boards of review are usually *ex-officio* bodies, "who are either constituted judges of their own work of assessment or else are too unfamiliar with conditions with which they are called upon to deal. Hence the work of such boards is largely ineffective; political influences not infrequently enter into their determinations, and sometimes their conduct of official business has degenerated into a contest between groups of members representing urban and rural taxing districts, respectively, in which entire valuations of districts are arbitrarily increased or diminished."[1] Finally, in all but a few southern states there is a state board of equalization, performing functions for the entire state similar to those performed for the counties by the county boards of review. In a number of states this duty has been conferred upon permanent state tax commissions, which also have other important functions; while in still other states certain elective state officers, acting *ex-officio,* serve as the state board of equalization. The work performed by the last kind of state board has, on the whole, tended to become more or less perfunctory.

Improved methods of local assessment

Something has been done in a number of states to improve the work of local assessment, especially in a few of the larger cities, by lengthening the terms of assessors, giving them more adequate compensation, providing for appointment instead of popular election, and supplying them with modern tax maps and other necessary tools; and much more might be accomplished in this direction.[2]

[1] Mathews, *op. cit.*, 234.

[2] See L. Purdy, "The Assessment of Real Estate," *Nat. Mun. Rev.*, Supplement, VIII, 512-527 (Sept., 1919); W. A. Somers, "The Valuation of Real Estate for Taxation," *ibid.*, II, 230-238 (April, 1913); H. L. Lutz, "The Somers System of Realty Valuation," *Quar. Jour. Econ.*, XXV, 172-181 (Nov., 1910); W. B. Munro, "*Principles and Methods of Municipal Administration,* Chap. x.

Reform in local tax administration is of importance not only to the local communities but also to the state, from the standpoint both of safeguarding its sources of revenue and of increasing the efficiency of its administrative machinery; therefore state administrative supervision of the local taxing authorities should be added to the local reforms mentioned above. Such state central supervision has been introduced in a large number of states, and with especially good results in the thirty-odd states that now have permanent tax commissions. In a few states, notably Massachusetts and West Virginia, this work is attended to by a single official or tax commissioner; but in most cases the commission is composed of either three or five members serving from four to six years, and usually appointed by the governor and senate.

Central supervision by state tax commissions

The more efficient state tax commissions have for their main functions (a) the supervision of tax assessment and administration throughout the state, and (b) the assessment of certain kinds of property which are especially difficult to assess locally, for example, railroads, telegraph and telephone systems, express and sleeping-car services, and other public utilities. They have also taken over the equalization of assessments in the different counties or townships of the state and the instruction of assessors and other tax officials regarding the proper performance of their duties, including methods of procedure, accounting, and recording.[1] Counties are regularly visited, investigations conducted, prosecutions of delinquent officials or taxpayers instituted, and periodical reports submitted either to the governor or to the legislature. The powers exercised by these state commissions vary greatly, but the most effective instrument yet placed in their hands for controlling the work of local assessors consists of the right to investigate taxation conditions generally, to make intensive studies of the assessment work in particular localities, and, especially, to order a reassessment of particular pieces of property or of entire taxing districts. "The work of state tax commissions has undoubtedly brought about in most states a very decided increase in the percentage of actual assessments to full value," and also a "diminution of the inequalities between taxpayers and tax districts, and a general invigoration of the entire system of tax administration.[2]

Varied functions of state tax commissions

[1] H. L. Lutz, "The State Tax Commission and the Property Tax," *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 276-283 (May, 1921), and *The State Tax Commission* (Cambridge, 1918).

[2] Mathews, *op. cit.*, 248. See *Municipal Research*, No. 81 (1917), "Some

CHAP. XL

From what has been said, it will be seen that the general property tax is essentially a locally administered tax. This is not true of most of the other state taxes or other forms of state revenue, *e.g.*, taxes on the property of railroads. The assessment and collection of these state taxes are commonly entrusted either to the state tax commission or to some other state board or officer, such as the state treasurer or comptroller. Sometimes, however, there is a division of responsibility between state and local authorities in the assessment of corporate property. Thus, in Illinois certain portions of the real and personal property of all railroads, except the Illinois Central Railroad, are assessed by the local assessor, while the track, rolling-stock, and corporate excess are assessed by the state tax commission.

Assessment of other state taxes

The tax rate

When the amount of state appropriations for a given period has been determined and the amount of revenue receivable by the state from all sources except the general property tax is approximately known, the tax rate for the state's share of the property tax is determined by mathematical calculation. In some states the rate is fixed by the legislature, but in others by a state official or board.[1]

Collection of taxes

The collection of the state's revenues, especially the portion arising from the general property tax, is usually placed in the hands of local officers, and the amounts received, in so far as they belong to the state rather than the local divisions, are transmitted by the county collector or treasurer to the state treasurer. "The expense of collecting the revenue in this way sometimes consumes a large percentage of the gross proceeds." Other state revenues are paid directly to the state officers authorized by law to receive them; but these revenues do not always go directly into the state treasury, for in some states the fees that are collected by the insurance commissioner or by the secretary of state, for example, are used to pay the expenses of the offices collecting them, and only the surplus, if any, is paid into the treasury.

Custody of state funds

The state treasurer and the state auditor or comptroller are responsible for the safe-keeping and legal disbursement of the greater portion of the state funds. In about a dozen states these funds are kept in the state's own vaults, and consequently no interest is derived from them. In the great majority of states, however, cer-

Results and Limitations of Central Financial Control;" J. A. Estey, "Indiana's Tax Reforms," *Nat. Mun. Rev.*, IX, 411-413 (July, 1920).

[1] In Illinois the state tax rate is determined by the governor, the state treasurer, and the auditor of public accounts.

tain banks, located in different parts of the state, are designated as depositories of state funds; and all but four of these states receive interest on the state money deposited in such institutions.[1]

Appropriations and expenditures present many special problems

Having seen something of the diverse ways in which money is obtained for the support of the state government and the varied activities carried on under its auspices, we are brought to the point where a much-neglected, but exceedingly important, phase of the state financial system must be considered, namely, the methods by which money is allocated to, and expended by, the various officers, boards, commissions, and institutions.

Haphazard appropriation methods before 1913

Under conditions which prevailed in practically every state prior to 1913, and have not yet been entirely changed, it has been impossible to make wise plans for the distribution of public revenues among the several administrative activities or to control, in any strict and effective way, the use of state money or property. Every state officer has naturally magnified the importance of his own work and has seen unlimited opportunities for new services to be rendered. Inevitably he has sought increased departmental appropriations. With almost unlimited demands pouring in from a hundred or more agencies and institutions, and with no method of balancing claims upon the treasury one against another and of distributing appropriations on the basis of a full consideration of the interest and requirements of the state, unseemly scrambles for funds regularly took place whenever the legislature came into session. The departmental and institutional estimates were either merely "compiled" by some state officer, such as the treasurer or auditor, and transmitted by him to the legislature, or presented directly to the appropriation committees by the head of each state office or institution. No administrative officer acquainted with the entire business of the state reviewed these estimates, compared them, cut them down to agreed necessities, measured them against estimated revenues, and laid a carefully worked out and balanced financial program before the legislature.

Furthermore, each member of the legislature was at liberty to introduce as many bills as he chose carrying charges upon the state treasury. From day to day special appropriation bills would be passed by the legislature, with no responsible officer keeping tally or measuring their merits against the total expenditures and the

[1] In 1919 the Illinois legislature passed a law providing for the selection of state depositories on a basis of competitive bids, for a full accounting of all interest earnings on state funds, and for giving publicity to all matters connected with the handling of state funds. *Laws of Illinois*, 1919, p. 954.

CHAP. XL

estimated revenues of the state. One or two "general appropriation bills" providing for the support of the principal state offices or institutions, and sometimes containing thousands of items, would be made up by the appropriation committees of the house and senate. Rarely would these bills be brought out on the floor of the legislature for public discussion and criticism before the last two or three days of the session; and after a few hours devoted to rather perfunctory and ineffective criticism, they would be passed substantially as reported by the appropriation committees. After the general appropriation bills had been disposed of, a large number of petty appropriation bills, carrying a considerable sum in the aggregate, would be rushed through with little scrutiny and usually without debate.[1] Proposals to spend money came forward every year by the thousand, and their chance of adoption was not in proportion to their merits, but rather to the political influences behind them. When the legislature adjourned, no one knew definitely how much money had been appropriated.

Resulting waste and extravagance

In many states the governor could veto separate items; hence it became a common practice to combine essential and doubtful appropriations in a single item, in order to prevent a veto. Without knowing what the total authorized expenditures for the next fiscal period would amount to when the governor had finished vetoing bills and items, the legislature would pass the revenue bills which, in the meantime, had been prepared by other committees with little or no close relation to the work of the committees in charge of appropriations. Naturally, neither the governor nor the legislature could be held to a proper degree of accountability by the citizens of the state who had to foot the bills; and executive departments were often forced by the legislature to spend more money in the performance of their functions than the nominal head of the state government deemed necessary. With the initiative in matters of appropriation largely in the hands of several legislative committees, each considering separately and without adequate publicity a particular field of expenditure, and each subject to pressure of local interests and log-rolling methods of legislation, waste, extravagance, and deficits were inevitable.

[1] The Illinois legislature passed 94 appropriation bills in 1913 and 88 in 1915, some of them containing hundreds of items. The majority were not reported from committees or passed until near the close of the session, when adequate consideration was impossible. In 1915 the discussion of the "omnibus appropriation" bill in the senate, carrying $15,000,000, occupied only nine lines in the printed report of debates. The New York legislatures be-

Relief from these conditions became imperative as the cost of government mounted, and it has been found, in greater or lesser degree, in the various plans of budgetary procedure which have been introduced, since Wisconsin set the example in 1911, in all but two states.[1] Hardly any two of these plans are alike in detail; and there are some differences in fundamentals. The most important point of variation is the budget-making agency, in other words, the location of responsibility for the initiation of the budget or program of expenditures. On this basis the systems fall into three fairly distinct classes.

Budgetary reform

(1) Under the system adopted in Arkansas in 1913, the budget is prepared and submitted to the legislature by a legislative committee; and a similar system was in use in New York between 1916 and 1921. In New York, at least, this arrangement resulted in little, if any, real improvement upon conditions prevailing previously.[2]

Different budget systems

(2) Twenty-one states have laws providing for budgetary boards or commissions.[3] These are constituted in different ways: (a) in some states they include both administrative officers and members of the legislature; (b) in others *ex-officio* members only; (c) in still other instances the board consists of *ex-officio* mem-

tween 1916 and 1919 inclusive, passed 39, 81, 89, and 87 appropriation bills, respectively. *Report of N. Y. Committee on Reconstruction* (1919), 3-10, 312.

[1] Pennsylvania and Rhode Island. The movement for state budgetary reform is summarized in *Municipal Research*, No. 91 (1917), including bibliography; A. E. Buck, "The Present Status of the Executive Budget in the State Governments," *Nat. Mun. Rev.*, VIII, 422-435 (Aug., 1919); *ibid.*, "State Budget Progress," *Nat. Mun. Rev.*, X, 568-573 (Nov., 1921). A full history of the matter is presented in W. F. Willoughby, *The Movement for Budgetary Reform in the States* (New York, 1918), and a detailed analysis of all state budgetary laws down to 1919 may be found in *Report of N. Y. Committee on Reconstruction* (1919), Part IV. See also R. Montgomery, "Budgetary Legislation in 1921," *Amer. Polit. Sci. Rev.*, XVI, 73-78 (Feb., 1922).

[2] *Report of N. Y. Committee on Reconstruction* (1919), 3-10, 310-319. See also *Municipal Research*, No. 86 (1917), "The New York State Legislative Budget for 1917"; *ibid.*, No. 72 (1916), "History of Appropriations in the [N. Y.] Legislative Session of 1916." In 1921 the New York legislature created a state board of estimate and control to be the budget-making authority. This board consists of the governor, the chairman of the assembly ways and means committee and the senate finance committee, and the state comptroller. Nevertheless the legislative budget committee continues to function; requests for appropriations are addressed by the departments to both the new board and the old legislative committee, and both bodies compile from them their estimates of necessary appropriations. *Amer. Pol. Sci. Rev.*, XVI, 76 (Feb., 1922).

[3] Alabama (1919), California (1911), Connecticut (1916), Florida (1921), Georgia (1918), Kentucky (1918), Louisiana (1916), Maine (1919), Michigan (1919), Montana (1916), North Carolina (1919), North Dakota (1915), New York (1921), Oregon (1913-21), South Dakota (1917-19), Tennessee (1917), Texas (1919), Vermont (1915), Washington (1915), Wisconsin (1911), and West Virginia (1918).

bers and members appointed by the governor; and (d) in another group of states the board is appointed wholly by the governor. In nearly all of these states, the governor is a member of the board, or at all events may control the board through his appointees.

The executive budget in Maryland and Virginia

(3) The remaining twenty-four states have preferred what is called the executive type of budget, in which the governor is made more directly responsible for the formulation of the programs of state expenditures.[1] The best known systems in this class are those of Maryland, adopted by constitutional amendment in 1916, and Virginia, enacted by the legislature in 1918.[2] These two systems are broadly alike, yet with the important difference that Maryland has placed strict limitations upon the power of the legislature to increase the amount of appropriations recommended by the governor and to pass supplementary and special appropriation bills; while Virginia has not done so. In Maryland the legislature cannot, for example, amend the budget bill to change the school fund, or salaries and obligations required by the constitution; it may increase or decrease the items relating to the expenses of the legislature, or increase those relating to the judiciary; but it can only reduce or strike out other items.

How budgetary reform tends to check waste

Although differing greatly in the means and methods employed, all state budgetary plans have as their main object the centralization of responsibility for the proposal of state expenditures, with a view to a reduction of the cost of operating the various branches of the government.[3] It is everywhere coming to be recognized that sound principles of budget-making are a most effective means of avoiding waste of public money, and, at the same time, of securing better service in public administration. A budgetary system which embodies simple and clear methods of stating the uses to which public funds are devoted also enables the voters and taxpayers more easily to grasp the relative importance of each group of expenses,

[1] New Hampshire and South Carolina are included in this third group, although their budgetary plans contain important variations from the true type of executive budget.

[2] Maryland, Massachusetts, and West Virginia are the only states which have written budgetary provisions into their constitutions. On the Maryland and Virginia systems see A. E. Buck, "Operation of the Maryland Budget," *Amer. Polit. Sci. Rev.*, XII, 514-521 (Aug., 1918), and "The First Virginia Budget," *Nat. Mun. Rev.*, IX, 207-209 (Apr., 1920). In only a few states have the new budgetary systems, of whatever type, been in operation a sufficient length of time to furnish a very satisfactory basis of comparison with former methods.

[3] A. E. Buck, "The Budget in the Model State Constitution," *Nat. Mun. Rev.*, X, 382-385 (July, 1921).

and to know where the public money goes, what proportion is devoted to each state activity, and exactly what use is made of the appropriations granted to each of the state offices, boards, commissions, and institutions.

Essentials of an effective budgetary system

To be most effective in these directions, a budgetary system should embrace at least the following features. (1) Each state department, office, or institution should be required to submit to a central budget-making agency, two or three months before the meeting of the legislature, an estimate of its financial needs for the ensuing fiscal period, upon uniform sheets having items arranged in accordance with some uniform system of classification. (2) The central budget-making agency should then make a careful review, revision, and compilation of the estimates thus submitted; and to aid it in this work, it should be given a staff to conduct investigations and make reports. (3) At some time within the first few days of the legislative session this budget-making agency should submit to the legislature a detailed financial statement, called the budget, which is simply another name for a comprehensive program of recommended expenditures and estimated revenues, arranged by departments and functions, and minutely compared with past expenditures and revenues. This should be accompanied by a balance sheet, a debt statement, and a statement of the financial condition of the state for each year covered by the budget. (4) All of the appropriations provided for in the budget-bills submitted with the complete budget statement should be consolidated in a single appropriation bill; unless, as in a number of states, the constitution requires that appropriation bills for salaries of state officers shall not include other items of expenditure. (5) The legislative committees should forthwith proceed to a consideration of the budget proposals, and should promptly report their appropriation bills to their respective houses. Ample time should be allowed for debate, criticism, and amendment; and the bills should be passed a minimum number of days before the close of the session.[1] (6) No supplementary or special appropriation bills should be enacted until after the final passage of the budget bills; and in all such cases a two-thirds or three-fourths vote might well be required.

[1] One of the most radical changes in legislative financial procedure was made in New York in 1917, when the general appropriation bill was completed and introduced by the middle of March, left open to all the members for inspection for two weeks, amended in open session on the floor, and advanced to final passage only after opportunity had been given for criticism. *Municipal Research*, No. 86 (1917).

CHAP. XL

Ancillary reforms

Most students of state government are agreed that the executive type of budget is far better calculated to achieve the desired economy in state administration than any of the other systems mentioned above. Nevertheless, to be really effective, any budgetary system must be accompanied by at least three other reforms: first, the overhauling and reconstruction of the state administrative machinery, as explained in the preceding chapter; second, an alteration of the legislative methods of handling appropriation and revenue measures, especially with a view to closer coöperation between the budget-making agency and the leaders in the legislature;[1] and, lastly, the introduction of modern business methods in the purchase of services and supplies, the adoption of standardized and uniform accounting systems for all departments, and the installation of improved methods of auditing and controlling expenditures.[2] To a sound system of state finance, on the side of appropriations and disbursements, the clearing of the administrative jungle described in the preceding chapter is absolutely indispensable. As long as the state government includes the present scores of independent and uncontrolled offices, boards, and commissions, no adequate budgetary arrangements are possible. It is true that budgetary reform has gone forward rapidly in the past few years without waiting for the slower-moving processes of administrative consolidation to prepare the way; and improved budgetary methods have been introduced in many states where practically nothing has been accomplished in the way of administrative reorganization. It is not to be expected, however, that under such circumstances the resulting economies will measure up to those which have appeared where administrative consolidation and budgetary reform have been undertaken conjointly.

State debts

A final phase of state finance which requires a word of comment is borrowing and indebtedness. Unlike the national government, whose borrowing power is unlimited, all but three state governments[3] are restricted in this matter by constitutional provisions designed to prevent a recurrence of the reckless piling up of debts which marked the careers of state legislatures before the

[1] In Ohio, in 1919, independent action by six different committees on appropriations and revenue, and the archaic and unbusiness-like procedure of the legislature, destroyed the budget plan of the governor. B. E. Arthur, in *Nat. Mun. Rev.*, IX, 279-288 (May, 1920).

[2] See *Municipal Research*, No. 74 (1916), "The Accounting and Reporting Methods of the State of New York."

[3] Vermont, New Hampshire, and Connecticut. Massachusetts had no constitutional debt limit before 1918. For a summary of these constitutional restrictions, see p. 594.

Civil War and during the Reconstruction period. Nevertheless, practically every state is now in debt, and the aggregate of these state debts has more than doubled in the past twenty years. In 1902 the total amount was just under $235,000,000; by 1918 it increased to over $502,000,000. The per capita indebtedness has not, however, risen at the same rate; in 1902 it was $2.99, and in 1918 it was $4.86. The five states having the largest gross indebtedness in 1918 were, in order, New York, Massachusetts, California, Maryland, and Virginia.[1]

Bond issues

States borrow money, ordinarily, by issuing interest-bearing bonds running for a period of from ten to fifty years. These may take the form of either sinking-fund issues or serial issues, the two differing principally in the method provided for payment. Under the sinking-fund system all of the bonds of a given issue mature at one time, and a definite sum is set aside each year from current revenues to meet the principal and interest. Serial bonds, on the other hand, mature in instalments or series, thus enabling a definite proportion of a given debt to be extinguished every year, or at other stated intervals, by payments from current revenues which, under the other system, would go into the sinking-fund. Serial bond issues have rapidly grown in popular favor in the past two decades and seem destined to supplant the earlier sinking-fund system.

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[1] See *Ill. Const. Conv. Bull.*, No. 4 (1920), "State and Local Finance," 288-299.

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CHAPTER XLI

THE STATE JUDICIARY

Three important functions of the judiciary

The last, and in some respects the most important, of the three coördinate branches of state government remains to be considered, namely, the judiciary. The state courts perform three very important functions: first, they provide an agency for the settlement of the estates of deceased persons, and an orderly method of adjusting disputes between individuals and between individuals and state or local governments; second, they constitute the sole instrumentality in time of peace for determining the guilt or innocence of persons accused of violating the criminal laws of the state; and third, they serve as the guardian of the constitutional rights of the citizen against infringement by the state government and prevent the three departments of government from overstepping the boundaries marked out for each of them by the constitution. Furthermore, in not a few states certain non-judicial duties of an administrative nature have been imposed upon the judiciary, especially in connection with elections, the management of certain county affairs, the appointment of school boards, and the granting of certain licenses.[1]

The system of state courts

For the performance of these varied functions every state has a more or less elaborate system of courts, some of which are created by the state constitution and have their jurisdiction defined with great particularity therein, while others are established and regulated only by act of the legislature.[2] Although in no two states is the system precisely the same, there is yet a considerable degree of uniformity, and a general description will hold true except in matters of detail.

1. Justices of the peace

The lowest courts are those held by justices of the peace, who are almost always men devoid of legal training, although now and

[1] The extent to which such administrative duties may be imposed upon the judiciary is limited in an indefinite way by the doctrine of separation of powers. The highest courts are commonly held to be exempt. But the inferior courts are often assigned work of this character.

[2] Certain quasi-judicial powers are also exercised by state administrative boards, such as public utility and railway commissions, civil service commissions, and tax commissions.

CHAP. XLI

then one hears of a lawyer serving in this capacity. As a rule, these justices are chosen by popular vote in townships or other subdivisions of the county; in three New England states, however, and in about an equal number of southern states, they are appointed by the governor. The jurisdiction of the justices usually extends throughout an entire county, and includes both petty civil and criminal cases. In Illinois, for example, their jurisdiction includes civil cases in which the amount involved does not exceed three hundred dollars and criminal cases which are punishable by fines not exceeding the same amount. Practically everywhere the justices may also issue warrants for the arrest of persons charged with criminal offenses, and may conduct preliminary examinations of persons accused of felonies; and, if the evidence seems to warrant, they may "bind over" such persons to await the action of the grand jury. Justices may also solemnize marriages, administer oaths, and take the acknowledgment of many legal instruments. In contrast with practically all the other state and local courts, the justice courts have no clerks; no permanent official record is kept of their proceedings; and they have no official seal. They are, therefore, not "courts of record," as are the others. Furthermore, they may render a final decision in only the most petty misdemeanors and civil cases; in all other cases appeal lies to the next higher courts.[1]

Jurisdiction

Decreasing usefulness

As might be expected from their lack of special training for judicial work, the justice which these officials administer is of a rough and ready, more or less informal, type. In the early history of the country, when means of travel to the county seat (where the higher courts dispensed justice at infrequent intervals) were difficult and time-consuming, the rural justices of the peace performed very useful functions as tribunals near at hand for the adjustment of minor differences between members of the same community. With the greatly improved means of travel and communication existing to-day in nearly all parts of the country, it may well be doubted whether the office of justice of the peace deserves to be continued. In some localities, at any rate, the administration of it has been characterized by chicanery and extortion, and in some cities the office has been abolished entirely.[2]

[1] In Arkansas, Kentucky, and Tennessee the justices of the peace of each county constitute the county court, which acts as the principal administrative board for county affairs. In New York, Michigan, and Illinois justices of the peace act as members of the "town board" in their respective townships.

[2] In Chicago, for example, the practices of the justices of the peace became so intolerable that the office was abolished when the present municipal court

In incorporated villages and towns it is common to find police magistrates with jurisdiction similar to that of the justices of the peace, but restricted to cases arising within the limits of the incorporated area. In small cities provision is also made by law for special municipal or city courts, which are often called police courts; and in the largest cities there is a somewhat intricate system of courts of first instance with both civil and criminal jurisdiction.[1] In such places it is not unusual to find, as in Chicago, that the office and jurisdiction of the justice of the peace have disappeared within the city limits.

2. County courts

A county court is held at least once a year in practically every county in the country. In some states this court is called the court of common pleas, and in others the district or circuit court. Sometimes there is a separate judge of the county court in each county, as in Illinois; but in other states it is not unusual to find two or more counties combined in a judicial circuit or district in which there are one, two, or even three circuit or district judges who, at stated intervals, hold a session of the county court in each county comprised in the circuit or district. The term of judges of the county court is rarely longer than four years; and in more than three-fourths of the states these judges are chosen by popular vote.

Jurisdiction

County courts almost invariably have original jurisdiction over all criminal cases, and generally also final jurisdiction in such cases in so far as questions of fact are concerned, although disputed questions of law may be carried on appeal to one or more of the higher courts. In the county court, also, persons accused of crimes and bound over by a justice of the peace to await the action of the grand jury usually have their guilt or innocence determined. In civil cases the county court usually has unlimited jurisdiction, although in some states it is restricted to cases involving less than a stated amount. Its jurisdiction in civil cases is both original and appellate. The great majority of cases coming before it, however, are commenced in it; cases in which it has appellate jurisdiction are brought to it on appeal from decisions of justices of the peace or municipal police courts. In some states the judge of the county court also acts as probate judge in the settlement of the estates of deceased persons and in passing upon matters relating to the property, custody, and welfare of minor children and other per-

was created in 1905. See *Ill. Const. Conv. Bull.*, No. 10 (1920), "The Judicial Department," 762 ff.

[1] See Chap. XLVIII.

sons under guardianship. In the most populous counties, however, a separate probate, surrogate, or orphan's court usually attends to such matters.[1] In not a few states, too, the county court has important administrative duties in connection with the enforcement of certain state laws or with some phases of county government.

3. Supreme courts

The highest state court is almost always called the supreme court, although in New York it is called the court of appeals, and in New Jersey the court of errors and appeals; in both of these states there is a "supreme" court, but it is inferior to the courts just mentioned. Usually the supreme court consists of from five to nine judges, who, as a rule, sit together in the hearing of cases, although in a few states the court is authorized to sit in sections. In any event, a majority of the whole number of members of the court or section must concur in any decision rendered. The judges are usually elected, being chosen either on a general ticket or by districts; although under a third method candidates are nominated from different districts and voted for by the voters of the entire state. The term of office ranges all the way from life or during good behavior in Massachusetts, New Hampshire, and Rhode Island, and from twenty-one and fourteen years in Pennsylvania and New York, respectively, to two years in Vermont. In the last-mentioned state, however, it is customary for the legislature to reëlect a sitting judge as long as he is willing or physically able to serve. Six-year terms are the most common, being found in seventeen states.

Functions

The work of the supreme court is almost wholly confined to hearing and deciding appeals upon questions of law which come up from the lower trial courts, although in a few special cases proceedings may be begun in the supreme court. The constitutions of eight states also authorize the governor or the legislature, or both, to require the opinion of the supreme court judges upon important questions relating to the construction and constitutionality of existing or proposed legislation.[2] Ordinarily, however, the supreme court of a state, like the highest federal court, will express

[1] In some New England states there are no county judges, but the several judges of the superior (or supreme) court hold court in the different counties throughout the state, in addition to serving collectively as an appellate court. There are also special probate districts in each of which there is an elective probate judge.

[2] Maine, New Hampshire, Massachusetts, Rhode Island, Florida, Missouri, Colorado, South Dakota. The best book on the subject of advisory opinions is A. E. Ellingwood, *Departmental Coöperation in State Government* (New York, 1918).

an opinion upon such matters only when the questions come before it in the ordinary course of litigation.[1]

4. Intermediate courts

Between the highest court and the trial or county courts about one-third of the most populous states have established one or more intermediate courts, commonly called superior or circuit courts, whose judges are usually elected from a few large judicial districts into which the state is divided for this purpose. These intermediate courts may have original or appellate jurisdiction, or both. The cases in which they have original jurisdiction are often determined by act of the legislature and usually include, among others, contested election cases and civil cases involving large sums of money. As appellate courts, they hear appeals from the county or other inferior courts, and are often empowered to render final decisions in such cases in order to relieve the congestion of business before the supreme court.[2]

State courts independent of federal courts

All of the state courts which have been described exist quite independently of the system of federal courts established by the national constitution and by acts of Congress; there is no foundation whatever for the common notion that the highest state court is subordinate to the lowest federal court. Certain classes of cases may be commenced in either the state or the federal courts; and any case originating in a state court which involves the determination of any right claimed under the national constitution, laws, or treaties, may be transferred or carried on appeal to the federal courts. The great majority of cases coming before the state courts do not, however, raise any such "federal question," but involve simply the adjudication of rights claimed under the state constitution, the state statutes, or the old English common law when not modified by state legislation.

Even a bare outline of the judicial machinery of the state

[1] The decisions of the supreme court and, in some states, of the next inferior court also, are published regularly in volumes known as *Illinois Reports, Indiana Reports,* etc. The publication takes place under the editorial supervision of a reporter of decisions appointed by the court. See O. N. Carter, "Methods of Work in Courts of Review," *Ill. Law Rev.,* XII, 231-259 (Nov., 1917).

[2] In some states the same judges administer both common law and equity, but in others there are separate courts of equity or chancery to handle cases to which, for one reason or another, common law forms of action do not apply. Some states also permit themselves to be sued in what are called courts of claims. New York has gone farther than most states in opening its court of claims to actions based upon both contract and tort. Where such a court does not exist private appeals are often made to the legislature; and in some states this has been productive of grave abuses. See P. S. Reinsch, *Readings on American State Government,* 168-172.

CHAP. XLI

Court officials

should mention certain officers who assist the courts in the administration of justice. The attorney-general of the state often appears before the courts to represent the state in pending litigation, and sometimes he exercises a limited supervision over the enforcement of the criminal laws or the trial of criminal cases by the county prosecuting attorneys. The importance of the prosecuting attorney and of the sheriff as the executive officer of the courts will be more fully commented on in chapters on county government.[1] Attached to all courts of record is an officer variously called a clerk, a register, or a prothonotary, sometimes appointed by the judges constituting the court, but in many states elected by popular vote. This official keeps the court records, issues legal processes as directed by the court, and is custodian of the court seal.

The trial jury

Many civil cases are tried by one or more judges without a jury; but all of the state constitutions contain provisions guaranteeing trial by jury in most civil cases, unless waived by the parties to the suit, and also in all criminal cases with the frequent exception of petty misdemeanors. In most states the trial jury is merely the judge of the facts in the case, the court itself passing upon all questions of law arising incidentally to the introduction of evidence before the jury or otherwise applicable to the case. In some states, however—Illinois, for example—the jury is made the judge of both the law and the facts. At common law the petit or trial jury consisted of twelve impartial persons, and their unanimous agreement was required for the rendition of a verdict. This rule still prevails in a majority of the states, but in recent years modifications of the old jury trial, in both civil and criminal cases, have been adopted in about a third of the states. For example, the constitutions of nine states now authorize civil trials, in courts of record, by juries of less than twelve persons, and seven states make similar provision for criminal trials.[2] Twelve state constitutions authorize verdicts by something less than unanimous vote (usually three-fourths) in civil cases, and six states apply the same rule to most criminal cases, although in capital cases all states still require a unanimous verdict of a jury of twelve.

The grand jury

Like the petit jury, the grand jury has also been inherited from English common law; but unlike the petit jury, it has nothing to do with the actual determination of the guilt or innocence of persons accused of crimes: it is concerned almost exclusively with

[1] Chaps. XLIII-XLIV.

[2] In trials before justices of the peace juries of six persons are authorized in some states.

the commencement of criminal proceedings. Upon its own initiative, it may bring indictments against persons who, in its judgment, have violated the laws of the state. But in most instances the initiative is taken by the prosecuting attorney, who lays before the grand jury the evidence which, in his judgment, is sufficient to justify placing the accused person on trial. If the grand jury concurs, it endorses upon the draft indictment prepared by the prosecuting attorney the words "a true bill," and the foreman of the jury attaches his signature. If, on the other hand, the grand jury is not satisfied that the prosecuting attorney has sufficient evidence to make out a "prima facie case" against the accused, it generally instructs its foreman to endorse on the draft indictment "this bill not found." Proceedings before a grand jury are secret and wholly *ex parte*, or one-sided, unless the accused voluntarily submits to an examination before that body.

Indictments

At common law the grand jury consisted of not fewer than thirteen nor more than twenty-three persons, and the concurrence of twelve was necessary for the bringing of an indictment. State constitutions or statutes in nearly a third of the states now provide for a smaller grand jury and a corresponding reduction in the number whose concurrence is required. In all but ten states the constitution provides for the periodical summoning of the grand jury, and in these ten similar provision has been made by statute. In earlier times the institution of the grand jury furnished much-needed protection to the private citizen against arbitrary prosecution for alleged criminal offenses by officers of the crown; and throughout the early history of the states indictment by grand jury was required for the prosecution of practically all crimes. Under modern conditions, however, the grand jury seems to be an unnecessarily cumbersome and expensive method of instituting criminal prosecutions; and we find that, although about half of the states still require indictment for all of the more serious offenses called felonies, the other half have departed in varying degrees from the old common-law practice. Some constitutions expressly authorize the abolition or modification of the grand-jury system by the legislature; others make prosecution by indictment or by information alternative processes regardless of the seriousness of the offense. In a half-dozen states in which indictment and information are concurrent remedies a grand jury may be called only upon an order of the judge of a court having power to try and determine felony cases. In such states indictment by

Diminished importance of the grand jury

Informations

grand jury is rarely resorted to, and practically all criminal prosecutions are instituted by the process called information. Under this process the prosecuting attorney files with the proper court a formal charge in which, upon his oath of office, he "gives said court to understand and *be informed*" that the crime described therein has been committed by the person therein named; and from this phraseology the process gets its name, "information."[1]

Defects of the state judicial system

When eminent leaders of the bar, able and respected judges of both state and federal courts, deans and professors of the best law schools, and an ex-president and chief justice of the United States,[2] concur in pronouncing the organization of our state courts and their methods of administering justice in both civil and criminal cases sadly defective, if not in grave danger of breaking down, the average lay citizen may well become interested in the situation and in the remedies which are proposed. The criticisms most frequently directed against the state judicial system fall into three main groups. The first relates to the structure or organization of the courts, including the term for which judges are chosen, their compensation, and especially the method of selecting and removing them; the failure to develop highly specialized courts for the exclusive handling of certain classes of cases;[3] the overlapping jurisdiction of different courts, and the absence in most states of unity in judicial organization; a very general failure to recognize that the efficiency with which justice is administered depends largely upon proper provision for handling the administrative side of court work; and the equally general failure to insure centralized supervision over the work of judges of the different courts throughout the state, who at present are legally independent one of another and of any central directing head. In this class of defects may also be included the fact that the work of our courts is almost wholly restricted to the redressing of wrongs *after* their commis-

1. As seen in the organization of the courts

[1] For farther facts relating to the grand and petit jury systems, see *Ill. Const. Conv. Bull.*, No. 10 (1920), "The Judicial Department," 828 ff; McLaughlin and Hart, *Cyclopedia of Amer. Govt.*, II, 268; *Jour. Amer. Judicature Soc.*, IV, 77-82 (Oct., 1920); *Green Bag*, XXVI, 203-217 (May, 1915).

[2] President, now Chief Justice, Taft said in 1909: "It is not too much to say that the administration of criminal law in this country is a disgrace to our civilization, and that the prevalence of crime and fraud, which here is greatly in excess of that in European countries, is due largely to the failure of the law and its administration to bring criminals to justice." Quoted in M. Storey, *The Reform of Legal Procedure*, 3. See also R. B. Fosdick, *American Police Systems* (New York, 1921), Chap. I.

[3] Except in some of our large cities, where highly specialized courts are to be found. See Chap. XLVIII. Cf. H. Harley, "Court Organization for a Metropolitan District," in *Amer. Polit. Sci. Rev.*, IX, 507-518 (Aug., 1915).

sion, to the comparative neglect of agencies and principles of *preventive* justice.[1]

2. As seen in court procedure

A second group of criticisms, relating chiefly to court procedure, includes protests against the numerous petty limitations imposed upon the trial judge by legislative action; against the constant amendment, in some states, of the rules of court procedure by the legislature, often at the behest of litigants who hope thereby to gain some advantage in a particular case; against the unlimited number of appeals to higher courts, and the tendency of appellate courts to reverse decisions upon purely technical or very trivial grounds; against the long delay possible in bringing cases to trial and in the empaneling of juries in criminal cases; against the unnecessarily long-drawn-out examination of witnesses and the unlimited number of objections permitted to counsel; against the inability of the trial judge really to control the procedure in his court as an English judge is able to do; against the rule in criminal cases that the failure of the accused to testify may not be commented on before the jury by the prosecution; against the rule requiring unanimous verdicts by juries; and against the rule permitting juries to be judges of the law as well as of the facts.[2]

3. As seen in the judicial veto

A third class of criticisms includes those relating to the long-discussed power of the courts to declare state laws and local ordinances unconstitutional.

Methods of selecting judges—popular election

Limitations of space permit consideration of only four of the principal criticisms which have been mentioned, *i.e.*, those having to do with (a) the selection of judges, (b) removals, (c) the lack of means of preventive justice, and (d) the judicial veto on legislation. Foremost among the criticisms included in the first general group is the objection which is raised against the prevailing method of selecting judges. In the early history of the country judges were chosen by the legislature or appointed by the governor with

[1] Excellent articles dealing with various aspects of judicial reform, especially those related to the structure and organization of the courts, will be found in the bi-monthly issues of the *Journal of the American Judicature Society* (31 West Lake St., Chicago), and the numerous bulletins published by this Society, whose object is the promotion of the efficient administration of justice. For a searching criticism of judicial qualifications and methods, see the preface to J. H. Wigmore, *A Supplement to a Treatise on the System of Evidence* (2nd ed., Boston, 1915).

[2] The non-professional student will find interesting and illuminating criticisms of court procedure in G. W. Alger, "Swift and Cheap Justice," *World's Work*, XXVI, 653, and XXVII, 53, 160, 333, 424 (1913); W. H. Taft, "Delays and Defects in the Enforcement of Law," and J. W. Garner, "Crime and Judicial Inefficiency," both reprinted in P. S. Reinsch, *Readings on American State Government*, 173-198.

the concurrence of the executive council or the senate. These methods are now retained in only ten states;[1] in the others the judges of practically all courts are chosen by popular vote. Professional as well as lay opinion is somewhat divided on the wisdom of this method, but "information collected from a large variety of representative sources of professional opinion seems to indicate that in only three out of the thirty-eight states that elect judges by popular vote are the results considered to have been generally satisfactory—these being Maryland, Iowa, and, in a special degree, Wisconsin. In five others, New York, Pennsylvania, Michigan, Minnesota, and Missouri, the system is said to give fair satisfaction, and in all the rest there are different grades of professional dissatisfaction with it."[2]

Long experience has disclosed two inherent weaknesses of the elective system: first, in populous communities, especially in metropolitan districts, popular election is no more likely to result in the choice of persons qualified to perform the highly technical work required of the judiciary than it is to secure the selection of experts in other branches of state government or in the field of municipal administration; second, what passes under the name of popular election of judges is often such in only the most superficial sense, being in reality nothing more than a method of appointment by politicians who succeed in putting their judicial "slates" through a so-called non-partisan primary, or through party primaries, or through nominating conventions. All that is generally left for the voter to do on election day is to endorse one or the other of two judicial tickets thus submitted by irresponsible persons who are not mainly interested in the administration of justice, and who, therefore, often fail to pick candidates having the qualities most needed in a judge, namely, unquestioned integrity, dignity, independence, judicial temperament, and adequate legal training for highly technical duties.[3]

[1] In four states (Vermont, Rhode Island, Virginia, and South Carolina) the judges of the highest courts are chosen by the legislature; in six states (Maine, Massachusetts, New Hampshire, Connecticut, Delaware, and New Jersey) they are appointed by the governor subject to confirmation by the executive council, the senate, or the legislature; in the remaining thirty-eight states they are elected by the people.

[2] J. P. Hall, "The Selection, Tenure, and Retirement of Judges," in *Jour. of Amer. Judicature Soc.*, III, 37-52 (Aug., 1919); L. Hand, "The Elective and Appointive Methods of Selecting Judges," *Acad. Polit. Sci. Proceedings*, III, 130-140 (1913).

[3] Sometimes, however, the politicians overreach themselves. This happened in Chicago in 1921, when the Thompson-Lundin machine in control of the city

Proposed substitutes for popular election

Despite widespread and well-justified dissatisfaction with the practical workings of popular election of judges, the system has become so firmly entrenched in the popular mind and has contributed so greatly to the influence of certain political leaders that there seems little prospect of an early return to either the method of legislative election or that of executive appointment. Most of the newer plans on the subject have, therefore, sought to combine the best features of popular election with some method of appointment designed to ensure open and official responsibility.[1] One of these plans proposes simply that whenever an important judgeship is to be filled the governor shall be permitted to nominate a candidate for each vacancy in addition to any other nominee that there may be. The voters would then have an opportunity to elect the governor's candidate if he seemed a better man than any one of the candidates put up by the unofficial party leaders. Another proposal gives to the members of the state bar association, who are presumably best fitted to pick properly qualified judicial candidates, a similar privilege of nomination. It is interesting to note in passing that in the state where popular election appears to have worked most successfully, namely Wisconsin, this result is attributable mainly to an extra-legal practice whereby the judges are virtually nominated by the bar association. Doubtless each of these two plans would operate most successfully where judges are elected on non-partisan ballots.

A third plan, recently urged as a constitutional amendment in California, authorizes the governor to nominate all judges not later than July first of the year in which a judicial election occurs. At the November election the people of the state, or of the judicial district concerned, would vote to confirm or reject the governor's nominations, a majority of those voting on the question being necessary to confirm. If the nominee were rejected, the governor would be required to appoint some other person to fill the vacancy until the next election. This plan "has most of the advantages of an outright appointment by the governor, but leaves the

government set out to capture the twenty circuit court judgeships in the June election. The effort roused the community as few political incidents have done in recent years and resulted in overwhelming defeat for the machine. See A. C. Miller, "How the Chicago Bar Association Walloped the Spoilsmen," *Jour. Amer. Judicature Soc.*, V, 46-52 (Aug., 1921).

[1] In other countries, appointment in some form is almost universally employed. See H. Harley, "Taking Judges Out of Politics," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXIV, 184-197 (Mar., 1916); "How Shall Judges Be Chosen?" *Jour. Amer. Judicature Soc.*, III, 75-90 (Oct., 1919).

CHAP. XLI

ultimate control with the voters, plus the very desirable feature that the nominee is not running against somebody, thus greatly diminishing the prospect of extraneous considerations influencing the electorate."

The most radical plan recently proposed is the popular election of a chief justice in each court for a moderate term, and appointment by him of the other judges in his court as vacancies arise; such appointments to be for life unless, at stated intervals, the people should vote to retire any particular judge or judges. Three years after his appointment the name of each judge would go on a judicial ballot with the question, "Shall he be retained or retired?" Unless a majority voted to retire him, he would be retained. Again, seven years later, the same question would be asked, and again ten years thereafter. Thus in twenty years the voters would have three chances to retire a judge thought by them to be unfit. But the judge would never run against any one, or on any party ticket; he would run only against his own record. The chief justice would presumably be chosen largely upon the basis of his fitness to select good associate judges; so that these judges might be expected to be very carefully picked. Furthermore, each judge would serve a probationary period before a popular verdict was rendered on his work, and from that popular verdict all irrelevant considerations, such as the personal popularity of some rival candidate, would be eliminated.[1]

Removal of judges:

The question of how to retire from office judges who prove incompetent or unworthy of public confidence presents a problem of peculiar difficulty, and no state has solved it in a way which meets with anything like general approval. The ideal method of removal must be one which can be put into operation without undue delay, and which, nevertheless, ensures for the judge whose removal is sought a fair hearing before a tribunal free from partisan bias and not subject to the influence of waves of popular passion. Three or four principal methods now in use in the different states fall more or less short of these requirements.

1. by failure to renominate or reëlect

Where judges are selected by popular election, retirement may be effected by refusal of the party leaders to approve the renom-

[1] For farther discussion of these proposed methods, see *Jour. of Amer. Judicature Soc.*, especially Vol. III (1919); A. M. Kales, "Methods of Selecting and Retiring Judges in a Metropolitan District," *Annals Amer. Acad. Polit. and Soc. Sci.*, LII, 1-12 (Mar., 1914); and *Amer. Judic. Soc. Bull.*, VI, reprinted as *Mass. Const. Conv. Bull.* No. 16 (1917), "The Selection and Retirement of Judges."

ination of a judge, either because they regard his character or work as unsatisfactory or because they desire to provide a place on the bench for some political friend; and wherever political organizations are strong this refusal is usually decisive.[1] If, furthermore, the party leaders see fit to permit or sanction a judge's renomination, he may be retired by failure of the voters to reëlect him. Popular election, however, is quite as likely to bring wrong results as right ones, for it often happens that a judge whose work on the bench has been entirely satisfactory is defeated for reëlection by circumstances wholly unrelated to his record as judge; for example, because of the greater personal popularity or capacity for self-advertisement of some less qualified rival candidate, or because some overshadowing issue in state or national politics, wholly unconnected with the judicial election, has swept down to defeat the entire party ticket on which his name appeared. Furthermore, popular election furnishes a means of retiring an unworthy judge only at a given time, *i.e.*, at the expiration of his term of office.

2. by impeachment or by legislative removal on address

In most states judges may be removed before the close of their term only by impeachment proceedings begun in the lower house of the legislature and tried before the senate, a two-thirds vote of the latter usually being required for conviction and removal.[2] The constitutions of twelve states, however, provide for removal by the legislature, and in nine other states the governor can remove, upon address of the legislature, after the English manner.[3] Neither impeachment nor legislative removal is without serious defects. Under either method there is much delay, and partisan considerations are likely to exert an improper influence. Furthermore, evidence sufficient to convince two-thirds of the senate or legislature may be hard to obtain; and the offense may not be grave enough to be a crime, while yet being sufficiently serious to warrant public condemnation and impair the judge's usefulness. In actual practice it has been found that impeachment and legislative removal do

[1] See W. R. Smith, "Politics and the Judiciary," in P. S. Reinsch, *Readings on American State Government*, 158-167.

[2] In Nebraska, impeachment proceedings must be instituted by a joint session of the two houses, and the supreme court acts as the trial body, except when a judge of the supreme court is impeached; in that case, the impeachment court consists of all the district court judges of the state.

[3] L. A. Frothingham, "Removal of Judges by Legislative Address in Massachusetts," *Amer. Polit. Sci. Rev.*, VIII, 216-221 (May, 1914). Six states (Connecticut, Massachusetts, New Hampshire, New York, Maryland, and Louisiana) have constitutional provisions permitting the retirement of judges on account of age or physical infirmity.

CHAP. XLI

not work, and that unfit judges have remained on the bench because no other modes of removal were available.

3. by a recall election

This experience has led seven states to adopt the drastic remedy of authorizing the holding of a special election in which the voters may recall the judge whose removal is sought. The people of these states, have, however, rarely availed themselves of their power of recall: in no state has the device been invoked against a judge of a superior or supreme court; and no judge has been recalled because of popular dissatisfaction with a decision involving any question of constitutional interpretation.[1]

Lack of facilities for preventive justice

Not the least serious defect of our state judiciary is the fact that our legal system largely confines its remedial instrumentalities to the redress of wrongs after their commission, and that preventive justice, through conciliation, arbitration, and the removal of uncertainty, remains almost entirely undeveloped. Only within very narrow limits is it now possible to clear up in advance any doubt as to the legal status of persons, the title to property, or the meaning of a contract. People are slowly coming to realize that whenever a person's legal rights are so uncertain as to cause him potential loss or disturbance the state ought to provide instrumentalities of preventive relief to remove the uncertainty *before* a loss or injury has been sustained. In recognition of this principle the legislatures of New York and several other states, notably Michigan, Wisconsin, and Florida, have recently adopted what is known in Europe as the "declaratory judgment," which broadens the field of preventive justice by permitting the courts to declare existing rights and duties before actual cause for a law-suit has arisen.[2]

The declaratory judgment

Judicial veto of legislation

But by far the most prolific source of criticism of state courts, among both lawyers and laymen, is their power to declare state

[1] Holcombe, *State Government in the United States,* 375. On two different occasions judges of the municipal court in San Francisco have been recalled, namely, in 1913 and 1921. See "A Judge Recalled by Women's Votes," *Literary Digest,* XLVI, 1048 (May 10, 1913); and P. Eliel, "Corrupt Judges Recalled in San Francisco," *Nat. Mun. Rev.,* X, 316-317 (June, 1921).

[2] The declaratory judgment law of Michigan was held to be unconstitutional by the supreme court of that state in 1920 on the ground that it imposed non-judicial duties upon the judiciary; see *New Republic,* XXV, 218-219 (Jan. 19, 1921). The New York law reads as follows: "The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration, whether or not further relief is or can be claimed, and such declaration shall have the force of a final judgment." New York Civil Practice Act, § 473. See *Amer. Polit. Sci. Rev.,* XX, 261-264 (May, 1921); *New Republic,* XXV, 192-194 (Jan. 12, 1921).

laws null and void because inconsistent with some provision of the state constitution. In recent decades this veto power has been exercised with increasing frequency. The tendency may be explained in part by the minuteness with which the newer constitutions define the organization and functions of the various branches of the government; in part, by the incorporation in the constitution of matters which more properly belong in the sphere of legislative discretion; and especially by the attempt to set precise metes and bounds to the activity of the legislature, thus rendering the work of lawmaking the hazardous occupation described in an earlier chapter.[1] The experience of Illinois and other states shows that the cases in which the constitutionality of legislation has been challenged before the courts have multiplied as the number of restrictions on the legislature have been increased by successive revisions of the constitution.[2]

"Due process" as a source of disagreement

The state courts originally used the judicial veto principally to protect their own constitutional rights. In more recent years they have used it, however, mainly "to condemn the fruits of incorrect legislative procedure and especially to maintain the integrity of 'due process of law.'"[3] Most of the protests against the judicial veto have been prompted by decisions nullifying social and economic legislation on the ground that it amounted to the taking of property or a deprivation of liberty without due process of law; and the dissatisfaction arising from these decisions has been deepened by the prevailing uncertainty as to the meaning of the phrase "due process." Whether or not a given law will be upheld under this clause depends, not upon any definitely ascertainable standard or definition as to what constitutes due process, but upon the economic and political views of the members of the court at the time the case comes up for decision. Under such circumstances the judiciary not only exercises judicial authority but determines questions of public policy as well. In other words, the judicial servants of the people have come to exercise a political power which enables them, if they are so minded, to defeat the

[1] Chap. XXXVI.

[2] The greater part of this increase occurred in the last thirty years, the cases arising between 1890 and 1913 outnumbering those which arose in the seventy years preceding 1890. See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 847 ff.

[3] Between 1870 and 1913 there were 115 cases before the Illinois supreme court under the due process clause, and considerably more than one-half of these cases arose after 1900.

CHAP. XLI

public will as expressed in legislation, at all events until the state constitution has been amended, or until the court has been reconstituted with judges holding different views of what is good public policy.

Possible checks on the judicial veto

As a result of this situation, one finds not only the leaders of organized labor but able and prominent lawyers advocating the curtailment of the political power of the judiciary by one means or another.[1] Perhaps the most obvious remedy would be a shortening of the state constitution through the elimination of matters of a legislative nature, together with the detailed restrictions upon the legislature. Another remedy might take the form of establishing a time-limit of one year from the enactment of a statute, after which the law might not be attacked in the courts merely because of defects connected with its form or technique, or because of irregularities attending its passage through the legislature.

But perhaps the most satisfactory check on the judicial veto of social and economic legislation would be the omission from the state constitutions of the so-called due process clause or its equivalent. As the state supreme court is the final judicial interpreter of the state constitution, the due process clause now means just what the supreme court of each state interprets it to mean. With forty-eight different state courts interpreting identical clauses, due process is found to mean one thing in one state and another thing in another state, and something still different when the federal supreme court interprets an identical clause in the national constitution. State supreme courts have frequently annulled legislation when practically identical legislation has been upheld by other state courts and by the federal supreme court under the due process clause of the Fourteenth Amendment. Criticism of the exercise of the judicial veto would, therefore, largely disappear with the omission of the due process clause from the state constitutions, thereby leaving the protection of private rights mainly to the federal courts, guided by the precedents of the national supreme court. In the opinion of good lawyers, there are no rights under state due process clauses which are not quite as adequately safeguarded under the federal due process clause.[2]

[1] G. E. Roe, *Our Judicial Oligarchy* (New York, 1912); W. L. Ransom, *Majority Rule and the Judiciary* (New York, 1912); W. F. Dodd, "The Growth of Judicial Power," *Polit. Sci. Quar.*, XXIV, 193-207 (June, 1909); A. M. Kales, *Unpopular Government in the United States* (Chicago, 1914), Chap. XVII.

[2] See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 852-853. Meanwhile two states, Ohio and North Dakota, have adopted con-

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C. E. Merriam, *American Political Ideas, 1865-1917* (New York, 1920), Chaps. V-VI.

A. B. Hall, *Popular Government* (New York, 1921), Chaps. VII-VIII.

Annals of Amer. Acad. Polit. and Soc. Sci., LII, 1-223 (Mar., 1914); LXXIII, 1-230 (Sept., 1917). Series of articles on judicial reform.

stitutional amendments requiring an extraordinary majority of the supreme court to declare a law unconstitutional. The Ohio amendment of 1912 requires the concurrence of at least all but one of the judges of the supreme court, except in affirming decisions of lower appellate courts declaring a law unconstitutional. In North Dakota a similar amendment, adopted in 1918, calls for the concurrence of at least four of the five judges constituting the supreme court. In Minnesota a like proposal, requiring the concurrence of five out of seven judges, was submitted to popular vote in 1914 and rejected. See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 850 ff.

In 1912 Colorado adopted a constitutional amendment providing for the "recall," or popular review, of judicial decisions, on lines advocated by ex-President Roosevelt in an address before the Ohio constitutional convention in that year. In 1921, however, the supreme court of the state held that the amendment was in conflict with the national constitution and therefore invalid. For a summary of this decision, see *Amer. Polit. Sci. Rev.*, XV, 413-415 (Aug., 1921). On the recall of judicial decisions, see T. Roosevelt, "The Judges, the Lawyers, and the People," *Outlook*, CI, 1003-1007 (Aug. 31, 1912); W. D. Lewis, "A New Method of Constitutional Amendment," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLIII, 311-325 (Sept., 1912); "The Recall of Judicial Decisions," *Acad. of Polit. Sci. Proceedings*, III, 37-47 (1913); W. F. Dodd, "Social Legislation and the Courts," *Polit. Sci. Quar.*, XXVIII, 1-17 (Mar., 1913).

CHAPTER XLII

THE PARTY SYSTEM IN THE STATES

National party lines in state government

The principal executive officers of all states, the members of every state legislature except that of Minnesota,[1] and the judges of the state courts in a majority of the states are nominated and elected to office as members of one or another of the two or three great national political parties which command the allegiance of probably more than nine-tenths of the voting population of the country; and the same thing is true of most of the various county, city, and other local officers who obtain their places by popular election.

To many people this projection of national party lines into the field of state and local politics appears not only illogical but inexplicable, unjustifiable, and responsible for much of the inefficiency of state and local governments. And it has to be admitted that it is not always easy to perceive any logical connection between the conduct of state, county, and municipal government and Republican and Democratic policies relating to national affairs. Administrative consolidation, budgetary and tax reform, reorganization of state judicial systems, the form and activities of city governments —these and other issues appear not to have the remotest connection with Republican, Democratic, or Socialist views on the currency, the tariff, the relations of the United States with Mexico or with the League of Nations, or with the question of government ownership and operation of railroads or other public utilities. Moreover, looking about, one may find plenty of cities in which local officials are sitting harmoniously around the council-table and efficiently administering the fire, police, health, educational, and other activities of their local governments, despite the fact that on such national issues as have just been mentioned they entertain the most widely divergent views.[2] So far as their city's affairs

[1] In Minnesota members of the legislature are elected on a non-partisan ballot.

[2] In almost all commission-governed cities officials are elected on a non-partisan ballot, although in the commission-governed cities of Pennsylvania partisan elections were restored in 1919. Boston, Pittsburgh, and some other large cities also use the non-partisan ballot.

are concerned, these officials appear to find the term Republican, Democrat, or Socialist quite irrelevant, if not altogether meaningless. How, then, is to be justified, or at least explained, this presence of the great national party organizations, not only as active, but usually as dominant, forces in state and local politics?

Explanation of national party activity in the states

An explanation, although it may not be an adequate justification, is not far to seek. In the first place, the importance of the national government, the far-reaching significance of national party issues, the exalted position of the presidency, the dramatic and often spectacular methods employed in national campaigns, and the varied and fervent appeals to the electorate combine to rouse a keener interest and to stimulate a larger participation in national, than in purely local and state, elections. To the national party with which the ordinary citizen becomes identified in such campaigns there soon springs up a permanent attachment, an abiding loyalty, a zealous devotion, against which purely local or state parties rarely have found it possible to prevail. Secondly, regarded from the viewpoint of national party leaders, the maintenance of national party organizations as active participants in state and local elections is a preparedness measure for the great presidential battles occurring once in four years and for the hardly less important congressional campaigns occurring also midway between presidential elections. Inasmuch as the states constitute the basic units for the election of these national officers, state political organizations inevitably form the basic units in the national party system. State and local officers also are often elected concurrently with national officers, as well as in the intervals between national elections; hence, national party activity in connection with the nomination and election of state and local officers serves to keep the national organization more alert and active, recruited more nearly up to its maximum strength, the different parts better articulated and running more smoothly, than if it were called into service only once in two or four years. Moreover, a steadily increasing proportion of people in most states now live in cities; hence, from the point of view of party leaders at least, the party's chances of winning the great national campaigns will be materially enhanced if the national organization can maintain from year to year in every important city well-organized units led by veterans trained in local political skirmishes.

Finally, a partial justification for national party activity in state and local governments is to be found in the fact that many

CHAP. XLII

Interrelation of national and local problems

of our most serious municipal problems, such as poverty, unemployment, child labor, high cost of living, physical degeneracy, and especially the immigration, naturalization, and Americanization of aliens, cannot be solved—indeed their solution can scarcely be even commenced—by cities without the coöperation of both state and national governments, which really means the coöperation of national political parties.[1] A noteworthy and highly commendable tendency has appeared in some parts of the country in recent years for national party organizations to include in their state platforms definite declarations or programs concerning important problems primarily of state and local interest or concern. Wherever this is done in good faith, the terms Republican, Democrat, Socialist, come to have a real significance apart from their national connotations.

Movement for non-partisan elections

Notwithstanding this explanation and partial justification, many people are convinced that the existence of national party lines in state and local politics has been productive of more evil than good, and that, in particular, it has been largely to blame for the existence in many populous communities of unscrupulous and corrupt political machines masquerading under the name Republican or Democrat. This feeling has grown to such proportions in the past two decades that various efforts have been made to divorce national and state party activities. Many states now have some provision for holding state and local elections, so far as practicable, in the intervals between national elections, in the hope that local issues will thus be determined solely upon their own merits, unclouded by national considerations, even though the state officials continue to be elected as Republicans, Democrats, or Socialists. Another step in the same direction has been the wide adoption of the non-partisan ballot, *i.e.*, a ballot bearing no indication of the party affiliations of candidates, for the nomination and election of city officers, judges in a few states,[2] and members of the legislature in Minnesota.[3] Wherever the non-partisan ballot has

[1] C. A. Beard, "Politics and City Government," *Nat. Mun. Rev.*, VI, 201-206 (Mar., 1917); M. D. Hull, "The Non-Partisan Ballot in Municipal Elections," *ibid.*, VI, 219-223 (Mar., 1917); M. R. Maltbie, "Municipal Political Parties," *Nat. Mun. League Proceedings*, VI, 226-238 (1900); W. B. Munro, *Government of American Cities* (3d ed.), Chaps. VII, XIV; M. Storey, *Problems of To-day* (Boston, 1920), Chap. I.

[2] Iowa had non-partisan nomination and election of judges for a short time recently, but abandoned it in 1917.

[3] In 1915 a proposed amendment for non-partisan nomination and election of all state officers was rejected by the people of California. For a quotation from Governor Johnson's message to the legislature recommending the adoption of such an amendment, see *Amer. Polit. Sci. Rev.*, IX, 313-315 (May, 1915).

been adopted it has been generally assumed by its advocates that the influence of national party organizations will be entirely eliminated from such elections, or at any rate will be reduced to a minimum. In many instances this has turned out to be the result, especially in relatively small communities. But in large cities or states where there are highly organized national party machines the result has been, and is quite likely to be, entirely different. Here, removal of party designations from the ballot facilitates secret and irresponsible combinations in support of a certain candidate or group of candidates to an even greater degree than is usual in frankly partisan elections. Furthermore, each political organization is almost certain to have its favorites upon the non-partisan ballot, in which case word is passed around to the rank and file that such and such men are the "organization" candidates, with the result that they receive partisan support to almost the same extent as candidates who publicly bear the party label.[1] Too great hopes of regenerating state and municipal politics must not, therefore, be staked upon the so-called elimination of national party lines through the medium of the non-partisan ballot. And it may be argued that while the Democratic or Republican party label does not mean very much in state or local elections, these labels do give the ordinary voter some idea of the forces or organizations behind a candidate; whereas, without that clue, he may be quite in the dark. Obviously, a poor clue under such circumstances is of greater assistance to intelligent voting than none.

Defects of the non-partisan ballot

Having thus seen something of the nature of the political organizations which are instrumental in placing most of our state and local officials in public office, we may turn attention to (1) the methods by which candidates are brought forward, or nominated, for state and local offices; (2) the series of committees which constitute the state party machinery; (3) the activities engaged in by these agencies; (4) the sources whence comes the money necessary to sustain these activities, and the laws which have been enacted to regulate the use of money in political campaigns; (5) the conduct of elections; (6) the qualifications and prerequisites for participation in elections; and (7) methods of enforcing a due sense of responsibility on the part of public officials to the electorate.

Important aspects of the state party system

The earliest systematic methods of nominating candidates for

[1] This is what has usually happened in the so-called non-partisan election of judges in Pennsylvania.

CHAP. XLII

1. Nominating methods

the principal state executive offices and for representatives in Congress took the form of legislative caucuses. In days when means of travel and communication were greatly restricted, it was extremely difficult to bring together party representatives from different sections of the state for the sole purpose of nominating candidates for public office. The sessions of the legislature, however, assembled a considerable number of political leaders from all parts of the state, and it was entirely natural that by the opening of the nineteenth century it should become customary for each party delegation in the legislature to meet in what was called a caucus for the purpose of deciding upon a list of candidates to be "recommended" to the voters for their support at an approaching election. Often, however, a party did not have members of the legislature from certain parts of the state, and in order that such districts might have a voice, the practice developed of inviting to the caucus persons who were not members of the legislature, but who could express the sentiment of the voters in the otherwise unrepresented districts. To the legislative caucus thus reënforced was given the name "mixed" legislative caucus.

The convention system

But before this system became firmly established, candidates for local offices in townships and cities were often nominated by more or less informal, and sometimes secret, meetings of party leaders which were also called caucuses. Frequently these groups appointed some of their number to confer with representatives of other similar caucuses with respect to the nominations of candidates for county offices or for offices of larger districts; and this custom soon developed into a systematic selection of delegates in local caucuses, according to some fixed plan of representation, to attend a formal county nominating convention.[1] In time, state nominating conventions, closely modeled upon the county conventions, supplanted the legislative caucuses in the nomination of state and congressional candidates. By 1830, and for upwards of eighty years thereafter, the convention system was the practically universal device employed for the selection of party candidates for all offices above those of the township or other subordinate political subdivision of the state.

Since about 1903, the use of the convention system has, however, been greatly restricted.[2] The scheme is still employed for the

[1] G. D. Luetscher, *Early Political Machinery in the United States* (Philadelphia, 1903), Chaps. III-IV.

[2] For a fuller discussion of the rise and defects of the convention system, see M. Ostrogorski, *Democracy and the Party System* (New York, 1910),

nomination of the principal state officers in a number of states, notably New York and Indiana; but in the great majority of states it has been superseded, not only for state and congressional offices, but also for county and municipal positions, by the direct primary system.

The direct primary

Under the direct primary method, candidates are nominated directly by the voters of each party, instead of indirectly through representatives called delegates; and this is the most fundamental and far-reaching difference between the two methods. The primaries of the different parties are usually held on the same day, and at the place where the regular elections are held later on; they are presided over by the regular election officials, and are surrounded by practically all the formalities and safeguards attending a regular election; hence, the appropriateness of the full name for this system, *direct primary election*.[1] The ballots used are usually of uniform size, shape, and color for the several parties, and are printed at public expense. Aspirants for a party nomination to any office, as a rule, get their names printed on the primary ballot by filing petitions signed by a specified number of qualified voters, the number being roughly proportioned to the importance of the office sought. Usually a candidate who receives the highest number of votes for a given office is declared to be the party nominee for that office, although where there are three or more aspirants for the same office this may result in nomination by less than a majority.[2] The right to participate in a party primary is generally restricted to fully qualified voters who either have been previously "enrolled" as members of the party or are able to declare under oath that they either supported at a recent preceding election or intend to support at the ensuing election a majority of the candidates named by that party. This is what is called a "closed" primary. On the other hand, a few states have what is called an "open" primary, in which voters are not obliged to disclose their regular party affiliations, but, upon entering the polling place, are given ballots of all parties. Under this arrangement, a

"Open" and "closed" primaries

Chaps. II-V, VII; E. C. Meyer, *Nominating Systems* (New York, 1902), Pt. I, Chap. V; F. W. Dallinger, *Nominations for Elective Offices in the United States* (New York, 1897).

[1] The best book on the direct primary is C. E. Merriam, *Primary Elections* (Chicago, 1908).

[2] Some of the southern states have provided that if no candidate obtains a majority of the primary vote, a second primary shall be held in which the voters shall choose between the two candidates standing highest at the first test.

CHAP. XLII

person's regular party membership may be kept secret, a feature which appeals strongly to many voters. At the same time, it affords an opportunity for the members of one party to assist in nominating weak candidates of an opposing party, and for this reason the open primary is regarded with little or no favor by party leaders generally.

New view of the legal status of parties

All of these regulations, as well as many minor details, are set forth in the primary laws of the states, a fact which in itself reflects a marked change in the public attitude toward parties in general, and especially on the methods by which they select their candidates for offices. Until comparatively recent years, party nominations were looked upon as matters in which the public had no legitimate concern, and consequently the convention system grew to maturity almost wholly unregulated by law. Parties were regarded as private organizations, and the way in which they chose their candidates was considered a private affair with which the legislature had no right to meddle.[1] Now, however, the nomination of candidates is rightly regarded as quite as important a public function as their actual election to office and, therefore, as falling within the field of legitimate state regulation. Moreover, political parties are no longer looked upon as private organizations, but as public institutions whose activities in other respects than nominations may also be controlled by law; so that now one finds in most states laws which regulate almost every phase of party activity, including the structure and functions of what is commonly called party machinery and the raising and expenditure of money in connection with political campaigns. Both of these matters call for some comment at this point.

2. Party machinery

The machinery of the two leading national parties consists of a complicated net-work of committees extending over the entire country and ramifying into every community. Such of these committees as make it their main business to promote the nomination and election of officers of the national government have been described in an earlier chapter. They, however, depend very largely for their success upon the efficiency of the much greater number of committees which make up the more continuously active state party organization.

State central committee

In every state the two major parties, and in some states minor parties as well, maintain a central committee which serves as the

[1] C. E. Merriam, *American Political Ideas, 1865-1917*, 278-288.

head of the state party organization.[1] In size, composition, and powers these central committees vary greatly, as also do the subordinate committees about to be mentioned. Such matters are now quite generally regulated by law; but in the absence of law, party rules govern. Members of the state central committee represent the various counties, or legislative or congressional districts, of the state, and are either elected directly by the party voters or chosen by delegate conventions. The committee usually elects its own officers, including a chairman (who may or may not be the real head of the state organization), a secretary, a treasurer, an executive committee, and any other committees that may be needed. When the convention system held undisputed sway, the state central committee, or an inner group, often exerted decisive influence upon the action of the state convention in nominating candidates. But since the adoption of the direct primary the committee's influence upon nominations has declined, or at all events has become much less conspicuous and decisive. Nowadays the committee's energies are concentrated upon the election of the national and state party tickets and the maintenance of an efficient party organization throughout the state between elections. Occasionally, too, the committee is empowered to formulate the state party platform.

Subordinate committees

Subordinate to the state central committee and operating in a more restricted sphere, similarly constituted committees are often found in every congressional district and in every legislative or senatorial district of the state; although sometimes these committees are made up almost wholly of *ex-officio* members, such as the chairmen of the county committees within the district. Of more importance, however, are the county central committees, found in practically every county, and the city central committees, found in almost all cities and especially influential in municipalities of the largest size. Almost every city ward and voting precinct also has its dual or triple set of party committees; and the same is true of nearly every village and township. Members of the county central committee and of the other local committees are usually elected directly by the party voters in the subdivision concerned. Originally, all of these committees consisted exclusively of male voters. But with the adoption of woman suffrage, some committees

[1] C. E. Merriam, "State Central Committees," *Polit. Sci. Quar.*, XIX, 224-233 (June, 1904).

CHAP. XLII

have expanded their membership so as to admit women voters, while in other instances the system of men's committees is rapidly being paralleled with a series of women's committees.

Party machinery and political "machines"

It should, of course, be made clear that the party machinery here described is inherently a different thing from the political "machines" of which we often hear. The real party machinery or organization is the foregoing series of committees, ramifying throughout the state. Every state, county, and other local subdivision has its party machinery in this sense. Happily, some states and many counties and smaller communities are without any political "machine." In the larger cities, on the other hand, the series of committees is sometimes identical with, or at least controlled by, a local "machine," in which case it is not inaccurate to use the terms machine and party organization interchangeably. Thus, the Tammany machine is the Democratic organization in New York County, and the Republican machine in Philadelphia is the Republican organization of that city. Sometimes the party organization for an entire state becomes a "state machine." Thus, there has been a "Hill machine" controlling the Democratic state organization in New York, and a "Quay machine" and a "Penrose machine" similarly dominant in the Republican state organization of Pennsylvania. Usually, however, the term "machine" applies to some smaller area and some lesser group of politicians, so that it is possible to find several "machines" within the same party in a single state. On the other hand, there is ordinarily only one Democratic or Republican organization for a state. The motives of persons in control of a machine are apt to differ from those animating the leaders of the real party organization; the latter, as a rule, seek primarily to promote the interests and success of the party as a whole, whereas the members of a machine often subordinate party interests to their own personal advantage, and are even ready secretly to sacrifice the party if thereby some important benefit may be secured for the machine.[1]

3. Party activities

The activities of the committees which constitute the party organization or machinery often begin in advance of the primaries or conventions in which candidates are nominated, with a view to bringing about the nomination of an "organization slate," or ticket of candidates favored by those in control of a given committee or series of committees. The greater part of the committees' work,

[1] P. O. Ray, *Introduction to Political Parties and Practical Politics* (rev. ed.), Chap. XVI.

however, relates, directly or indirectly, to the conduct of the "campaign" which begins shortly after nominations are made. Their efforts are then directed toward rousing interest in, and enthusiasm for, the party ticket among the rank and file of party members; they seek to enroll new voters; they endeavor to bring home to the voters the claims of the party and of individual candidates;[1] they take great pains to get out the full party vote on election day, and to ensure a fair count of the vote cast. Apart from laws designed to prevent such corrupt practices as fraudulent registration, repeating, and ballot-box stuffing, and laws regulating the collection and expenditure of money, the methods employed to achieve these results are almost wholly unregulated by either state or national law.

4. Party finance

The maintenance of party headquarters during campaigns and often, in the larger communities, throughout the year, the employment of organizers and other workers to make canvasses and assist in getting voters to the polls, expenses connected with the holding of political meetings, the compensation of speakers, and the publication and distribution of campaign literature entail the raising and spending of large sums of money in every warmly contested election, the amounts required increasing, of course, with the number of voters to be reached. The greatly augmented cost of political campaigning in recent years has resulted in numerous laws relating to party finance, most of them designed to restrict in various ways the use of money in connection with primaries and elections. Indeed, as we have seen, the only national laws relating directly to political parties come under this general description; and even these have been surprisingly few in number and in no case date farther back than 1907. But there has been a large output of state legislation on the subject.

Regulatory legislation

Taken together, the national and state laws fall into four fairly distinct classes. (1) Corrupt practices acts penalize bribery; prohibit treating, betting, soliciting or begging contributions from candidates for religious, charitable, or other purposes; forbid the payment of naturalization fees and poll taxes by others than the persons directly concerned; and regulate the publication of political advertisements in newspapers and periodicals, together with some matters not directly related to the use of money. (2) Other

[1] A number of states have laws which require the printing and mailing to every voter before primaries and elections of "publicity pamphlets" in which are to be found statements by the various party committees or candidates bearing upon their respective claims to favorable consideration.

laws seek to restrict the sources of party campaign funds by prohibiting contributions from corporations, by forbidding the assessment of national, and sometimes of state and municipal, office-holders, and by limiting the amounts which may be solicited from candidates. (3) Still another large class of laws aims to restrict the amounts which candidates and party organizations may spend in quest of votes. Some laws forbid candidates to spend more than a certain fixed sum, varying with the importance of the office, or more than a certain percentage of the salary attached to the office. Others limit the aggregate expenditures by political committees to a stated amount for each vote cast at the last preceding general election. In still other instances, unlimited expenditures are permitted for certain definitely enumerated purposes, expenditures for any other purposes being, by implication at least, prohibited. (4) Lastly, there are national and state laws which require the publication, either before or after a primary or an election, of the names of contributors and the amounts contributed by each person to any party campaign fund; and also requiring the filing of a detailed statement, under oath, of the amounts expended by candidates or committees and the object of such expenditures. On the whole, these various laws have not proved very effectual in reducing the amounts expended in legitimate ways; nor have they entirely eliminated illegitimate expenditures. These and other problems connected with party finance are, therefore, still far from a final or satisfactory solution.

5. Elections

In discussing nominating processes, party committees, and party finance, frequent mention has been made of the voters, or the electorate. Who are the voters? Who constitute the electorate, to influence whom such elaborate and costly organization and methods seem to be necessary? Every state answers this question for itself, and usually the answer may be found in an article in the state constitution dealing with the suffrage. If a state is disposed to be generous, even to the point of prodigality, in conferring indiscriminately the privilege of voting upon men, women, and children, there is nothing in the national constitution or laws to prevent. If, on the other hand, a state desires to confine the voting privilege to a restricted class, care must be taken that no citizens of the United States are discriminated against on account of race, color, or previous condition of servitude, or on account of sex; for discriminations on any of these grounds are definitely for-

The electorate

bidden in the national constitution.[1] In all other respects, however, the states are given a perfectly free hand in laying down their suffrage requirements.[2]

As we have seen, all states now have practically universal adult suffrage for citizens of the United States who are at least twenty-one years of age and have resided within the state for one year, or some other stipulated period, and within their home county and election precinct for a somewhat shorter length of time. The property qualifications which were universal at the opening of the nineteenth century have long since disappeared except in two or three states which still require the ownership of real or personal property, or the payment of taxes, as a prerequisite for voting. About a third of the states also impose some sort of an educational test, under which a person otherwise qualified to vote must prove his ability to read, or to read and write, or both to read and to understand a section of the state constitution. Sometimes, as in a number of southern states, a voter may qualify under either the educational or the taxpaying test, but is not obliged to meet both. Certain persons in every state, although possessed of all the specified qualifications for voting, are nevertheless deprived of the suffrage, either temporarily or permanently, because they are criminals, paupers, or insane. Formerly, the common requirement that, in order to vote, an elector must appear in person at his proper polling place in his home precinct on primary or election days in effect disfranchised thousands of voters who were detained from the polls by illness or accident, or whose business required their absence from home at the time when an election was being held. The rapid spread of absent-voting laws within the past ten years has done much to remedy this injustice by making it possible for such voters to cast their ballots *in absentia* or before leaving home. More than half of the states now have such laws.[3]

Registration of voters

Every state prescribes by law the way in which citizens who possess the prescribed voting qualifications may have their names placed upon the official voting-list used in primaries and elections; and persons who are not thus "registered" are not permitted to

[1] Amendments XV and XIX.

[2] K. H. Porter, *A History of Suffrage in the United States* (Chicago, 1919).

[3] For summaries of absent-voting legislation see *Amer. Polit. Sci. Rev.*, VIII, 442-445 (Aug., 1914); X, 114-115 (Feb., 1916); XI, 116-117 (Feb., 1917); XI, 320-322 (May, 1917); XII, 251-261 (May, 1918); XII, 461-469 (Aug., 1918).

vote unless they comply with certain additional formalities set forth in the law. The preparation of voting-lists is commonly managed by some county official or by the county board, although in large cities and in many counties there are special election boards for the purpose. Most states have a partial or complete system of personal registration, so-called from the fact that each voter must appear in person before the registration officials and prove his right to vote. In some states such personal registration may be made once for all; having once established his right to vote, the voter knows that his name will remain on the voting list until his death, removal from the district, or disqualification for some other cause. In point of fact, it is not always removed even under these circumstances. In most cities, however, periodical registration is required, annually or biennially. Under either system the work of registration is performed, as a rule, at the precinct polling places used on primary and election days; and it is almost always entrusted to the regular bi-partisan polling officials of the precinct, who in this way are supposed to become more familiar with the qualifications of the voters who will appear before them at the ensuing primary or election.

It is essential to a proper and efficient enforcement of registration and election laws that the officials charged with their administration be not only honest but intelligent and thoroughly familiar with the technical requirements of the law. Few states, however, have taken steps to entrust this work only to competent men of high repute. In some of the southern states the unscrupulous exercise of large discretionary powers by election registrars in applying educational and other tests to negro applicants for registration has resulted in disfranchising thousands of eligible negroes and in deterring other thousands from even applying for registration.[1] A thoroughgoing personal registration law should provide

[1] T. J. Jones, "Power of the Southern Election Registrar," *Outlook*, LXXXVII, 529-531 (Nov. 9, 1907). Some idea of the extent of negro disfranchisement may be obtained from the following facts: Louisiana, Mississippi, and Kansas have approximately the same population and representation in Congress; but in 1916 only 86,341 votes were cast in Louisiana and 84,675 in Mississippi (in both of which states more than half of the population is colored), while in Kansas 592,246 votes were cast. Similarly, South Carolina and Arkansas have about the same population; but only 63,396 votes were cast in the former, and 162,396 in the latter, while in Connecticut, a somewhat smaller state, 206,300 votes were cast (M. Storey, *Problems of To-day*, 122-123). The discrepancies are to be accounted for in some measure by the fact that Democrats, being assured of an easy victory, do not go to the polls in the southern states in the same proportion as in states where there is a real contest. But the main explanation is the practical disfranchisement of the negroes.

in detail, especially in cities, for a system of revising and purging registration lists prior to each primary or election. The need of this was brought out strikingly some years ago in Philadelphia, and more recently in Terre Haute, Indiana, where, in connection with the trial of the mayor and more than a hundred other local politicians, "one witness testified to the frequent registration of non-residents and of dead men, and in one case even of a pet dog. On election day these fraudulent registrations were voted on by hired repeaters and thugs."[1]

Election laws

Probably no kind of reading-matter is more unattractive to the ordinary citizen than the laws which govern the conduct of elections. Invariably phrased with the traditional legal verbiage and circumlocutions, they make extremely slow and difficult reading. Moreover they include a maddening maze of minute regulations applying to every stage of the nominating and election process—matters of which the elector is only dimly conscious, if conscious at all, when he votes once or twice a year. The election laws of most states therefore make up rather bulky volumes which few citizens ever have the courage to study. Nevertheless the character and provisions of these laws are matters of vital importance to citizens generally; for the ballot box is the only point of direct contact between most citizens and their government. However virtuous, public-spirited, conscientious, and well-intentioned a citizen may be when he goes to the polls, these good qualities or intentions may be rendered of no effect by poorly drawn and inadequate election laws, or by dishonest or incompetent officers, or by a long and confusing ballot. Such things, therefore, as the form of the ballot, the choice, qualifications, and duties of election officers—in fact, the provisions of election laws generally—are not to be passed over as the "mere mechanics" of popular government. They are, rather, matters which pertain to the very essence of such government.[2]

Election officers

Some of the main points covered by our election laws can best be summarized in connection with the work of the various election officers. Construed broadly, the term "election officers" covers three classes of officials: (1) those in charge of the preparations

[1] S. C. Stimson, "The Terre Haute Election Trial," *Nat. Mun. Rev.*, V, 38-46 (Jan., 1916). Over four and half million errors or omissions in the registration and poll books of the cities of New York were discovered in 1914 through the vigilance of the state superintendent of elections and his deputies.

[2] See "Outline of an Improved Method of Conducting Elections," *Nat. Mun. Rev.*, IX, 603-616 (Dec., 1921).

CHAP. XLII

for an election; (2) those in charge of polling places during an election; and (3) canvassing and returning officials.

The first class includes (a) the persons who are in charge of the registration or enrollment of voters prior to primaries or elections, and (b) those who designate the polling places, mark out election districts, appoint polling officers, prepare sample and official ballots, advertise the time and place of elections, and provide the necessary equipment for polling places. It is very common to put these preliminaries, except the registration of voters, in the hands of county officials, such as boards of supervisors or county commissioners, or of special election boards, as in New York, Chicago, and other large cities. Few people realize the magnitude of the preparations which precede an election in a large city, or even in a populous county. In New York or Chicago, upwards of twenty-five hundred polling places have to be arranged for; the boundaries of an equal number of voting precincts have to be marked out; from twelve to fifteen thousand polling officials have to be selected and appointed; arrangements have to be made for storing, hauling, setting up, and removing thousands of voting booths, curtains, guard-rails, and ballot boxes; all of the materials and supplies used at polling places—pens, ink, pencils, sealing-wax, candles, envelopes, poll-books, tally-sheets—have to be purchased and distributed; thousands of cards of instructions to voters and circulars of instruction to polling officers, and hundreds of thousands of sample and official ballots, have to be printed and sent to the proper places. Considering the haphazard way in which most election officials are chosen, the wonder is that the gigantic task is performed as honestly and efficiently as it is.

Polling officers

The second class of election officers comprises those who are in charge of polling places on primary and election days. Their number, titles, terms, and methods of selection vary from state to state. In the great majority of cases they are appointed on a bi-partisan basis, although in Pennsylvania they are elected by popular vote, a system which has proved very unsatisfactory. In New York one finds in every election precinct four inspectors of election, two poll clerks, and two ballot clerks, divided equally between the two principal parties. In Illinois there are three judges of election and two clerks in each polling place; and in Pennsylvania, one judge and two inspectors. In addition to these officials, party organizations or candidates frequently appoint a certain number of challengers or watchers, or both. Watchers are

entitled to see everything that is done by the election officers both at the casting and the counting of the ballots. Challengers, as the name implies, are present to prevent illegal voting. Police officers are also found in or near the polling places to maintain order, subject to the direction of the officials in charge.

Appointment and duties

The duties of polling officers are set forth in the election laws of the several states, and are essentially the same everywhere. These officers check and record the names of voters as they appear at the polls and have custody of the ballot boxes and the ballots. In some states they assist voters who are unable to mark their ballots unaided. And they pass in the first instance upon challenges, and sometimes have special police powers. Aside from preparing small circulars of instructions and distributing them a few hours before an election, few states make provision for securing well-qualified polling officials. Appointments in many places are distributed by local politicians among their friends as political favors and sometimes for sinister purposes, seldom with any regard to the technical requirements of the office. New Jersey is one of the very few states where persons nominated for polling positions by the county chairmen of the leading parties are required to pass examinations conducted in each county by the state civil service commission. A wider adoption of some system of examination would tend to secure a fairer administration of the election laws and more accurate recording and determination of election results.

Canvassing and returning officers

The third class of election officers includes canvassing and returning officials. When the polls close the ballots are first counted, or canvassed, at the polling places by the officials in charge.[1] In some states, *e.g.*, New York, the counting is done publicly; in others it is done only in the presence of the polling officers. Tally-sheets are provided to facilitate the count, and are preserved as a part of the official record of the election. Upon the completion of the count, all ballots, used and unused, including spoiled and defective ones, together with the poll-books and tally-sheets, are placed in sealed packages or in sealed ballot-boxes; and all are carefully preserved and guarded for a specified period, after which the ballots are destroyed. In 1916 San Francisco adopted an interesting arrangement under which the counting of ballots is no longer performed at the polling place by officials who are more

[1] See G. Mygatt, "Counting the City's Vote; How New York's Election Returns Come In," *Outlook*, CV, 535-541 (Nov. 8, 1913); A. M. Stoddart, "How the Newspapers Tell the Story of Election Day," *Outlook*, CXIV, 566-569 (Nov. 8, 1916).

or less exhausted after a hard day's work. Instead, all ballot-boxes are conveyed at the close of the polls to the office of the registrar of voters in the city hall, and there, under his supervision, are publicly counted, precinct by precinct, by competent persons specially selected for the work. Several states, including Kansas, Nebraska, New York, and West Virginia, quickly took up this idea and passed laws in 1917 for the appointment of "double election boards"; one board, called the receiving board, attends to the delivery of ballots to the voters, checks voters' names, and has general charge of the polling place; the other, called the counting board, proceeds to the polling place at a designated hour after the polls have opened, begins counting the ballots already cast, and remains at the task after the polls close until the count has been completed. When the precinct results have been ascertained, "return blanks" are made out in duplicate or triplicate, the proper election officer entering the exact number of votes received by each candidate and affixing his signature. One set is then sent off to the city or county clerk, or to the board of elections; another is transmitted to some higher canvassing body, *i.e.*, the county board of supervisors in California, the judges of the court of common pleas in Pennsylvania, the county clerk assisted by two justices of the peace of the county in Illinois, the board of election commissioners in most large cities. On a day fixed by law, these canvassing bodies in each county or city proceed to canvass the returns from the various precincts over which they have jurisdiction; that is to say, they add up the votes reported for each candidate from the different precincts. They then certify the result, so far as it concerns national and state offices, to some state official (usually the secretary of state), who is required to transmit these consolidated returns to a state canvassing board. In New York the state canvassing board consists of the secretary of state, the attorney-general, the state engineer and surveyor, the comptroller, and the state treasurer. In Illinois the board is made up of the governor, the secretary of state, the auditor, the treasurer, and the attorney-general. These state boards, in turn, add up and check over the results reported from the several counties. The last stage in the process is reached when the state and county canvassing boards file their reports with the officials designated by law, usually the county clerk in the case of county offices and the secretary of state in the case of state and national offices; whereupon these officials issue to each person declared to be elected a certificate of election,

Dual election boards

which is prima facie evidence of the legal right of the person named therein to hold the office and perform the duties connected with it.

Certificates of election

Such a certificate is not, however, conclusive; for all state election laws include detailed provisions for "contested elections," that is, for disputes arising when a defeated candidate alleges that he has been illegally denied a certificate of election. Such cases are commonly determined in the courts, although in some states, as Illinois, the legislature is the authority which decides conflicting claims to the highest state offices. Where such contests involve the right to a seat in the state legislature or in a city council the legislative house or the council concerned almost invariably has the power of decision.

The ballot

Secrecy in voting is now everywhere provided for, either in the state constitution or by statutes; and it has been effectually ensured by the almost universal adoption of some form of the so-called Australian ballot during the past thirty years.[1] Ballots are no longer left to be printed and circulated by candidates or party organizations, as before 1890, but are prepared by responsible public officials at public expense, and in accordance with standard forms prescribed by law. Names of the candidates of all parties usually appear on a single sheet, except in the case of presidential electors. When, however, a city election occurs on the same day with a state or national election, separate ballots are often prepared for city offices.

Principal types of ballot

The arrangement of the names of candidates on the ballot varies in different states but usually conforms to one or the other of two plans. In the party-column type of ballot, found in the majority of states, candidates of the different parties have their names printed in separate columns, at the head of which appears, in each case, the party name and a "party circle" or "party square." The voter has merely to place a single cross in this circle or square to ensure that his ballot will be counted for all the candidates of the given party. This obviously facilitates what is called "straight-ticket" voting, and accordingly the plan is regarded with high favor by party leaders. In Massachusetts, New York, and a number of other states, a different arrangement is employed. The names of candidates of all parties are grouped together under the title of the offices for which they are running, the designation of the party to which each candidate belongs appearing alongside his

[1] E. C. Evans, *A History of the Australian Ballot System in the United States* (Chicago, 1917).

CHAP. XLII

name. There is no way of voting a straight party ticket with a single cross as in the party-column type of ballot; on the contrary, to vote a straight-ticket, a voter must place a cross opposite the name of every candidate of a given party. For this reason, the Massachusetts type of ballot, as this form is called, is said to favor independent, or "split-ticket," voting. Pennsylvania ballots retain the grouping of candidates by offices, as in Massachusetts, but also provide in the left-hand margin a list of the parties represented on the ballot; and a single cross placed opposite one of these party names is counted as a vote for every candidate nominated by that party—a device which, of course, makes straight-ticket voting quite as easy as where the party-column type of ballot is employed. Montana and a few other states, although retaining the party column for the guidance of voters, omit the party square or circle at the head of the column, so that there is no possibility of voting a straight ticket merely by making a single cross.

Election system criticized

Few phases of our governmental system have been more severely criticized in recent years than our scheme of elections. The chief criticisms relate to the frequency of primaries and elections, the concurrence of local, state, and national elections, the large number of offices filled by popular election, and the almost universal rule of election by plurality vote. It will be useful to give some attention to these matters.

1. Frequency of elections

Concerning the frequency of elections, nothing more need be said than to call attention to the familiar fact that the election of president and vice-president occurs every four years; that some state officers are elected triennially, and others, along with most county officers, biennially; that many county and local offices are filled annually; and that practically all of these elections are preceded by primaries or nominating conventions. Not only do these frequently recurring elections and primaries impose a heavy financial burden upon the taxpayers, but they make it impossible for the average pre-occupied citizen to keep up an intelligent interest and to take an active part in the nomination and election of the men who in various ways act for him in the conduct of public affairs.

2. Concurrence of national, state, and local elections

National, state, and local elections often fall on the same day, with the result that the names of candidates for offices of all three kinds, or at all events for national and state offices, are printed on the same ballot. This frequently results in a serious confusion of national with state and local issues, to the detriment of state and

local government. A remedy has been sought in many states by arranging elections so that the most important state and local contests will be held in years in which presidential and congressional elections do not occur. Some states have not stopped here, but have also separated purely local from state elections. The latter divorcement may, however, easily be carried so far as unreasonably to increase the number of elections occurring in a single year, as has been done in Illinois.

3. The long ballot

Of far greater seriousness than either of the foregoing defects in our electoral system is the so-called long ballot, or "blanket" ballot, with which most voters are confronted when they go to the polls at presidential elections and at many state and local elections as well. The bewildering list of candidates to be voted on is accounted for partly by the number of offices now filled by popular election, partly by the coming together of national, state, and local elections, and partly by the fact that almost always there are two or more candidates for every office to be filled. The result is that ballots bearing three hundred, and even more than four hundred, names are by no means uncommon. Certain serious consequences are entailed. For one thing, it is extremely difficult, if not impossible, for a majority, or even a considerable minority, of the voters to form an intelligent opinion of the merits of the candidates, especially when elections take place frequently. Consequently, there is a great amount of blind voting, especially in the form of straight-ticket voting. Another result is that the merits of only the candidates for a few principal offices are seriously considered by even well-informed voters. Popular interest is usually concentrated upon candidates for president, governor, and mayor, to the almost complete neglect of the balance of the ticket. At best, in other words, there is intelligent voting for a few prominent officers, and blind voting for the great majority of minor officers. Taking advantage of popular preoccupation with the most conspicuous offices, politicians are often able to get wholly unfit candidates into minor, though not unimportant, positions.[1]

Need of shortening the ballot

The remedy for much of this blind voting is to shorten the ballot by sharply reducing the number of elective officers. Officers who have a share in formulating public opinion into law, or who enjoy large discretionary powers in the administration of laws—

[1] R. S. Childs, "The Short Ballot," *Outlook*, XCII, 635-639 (July 17, 1909); *ibid.*, "Ballot Reform: Need of Simplification," *Amer. Polit. Sci. Assoc. Proceedings*, VI, 65-71 (1909); *ibid.*, "Short Ballot Principles" (New York, 1911).

CHAP. XLII

in other words, all policy-determining officials—should continue to be elective. But there are very few of these. The president, the members of both branches of Congress, the governor and members of the legislature, and the mayor and members of the city council are obviously policy-determining officers. To a less extent, this is true of boards of county commissioners or county supervisors.

Offices that should be appointive

But here the list ends. Practically no other officials have anything to do with the formulation of public policy in the field of either legislation or administration. On the contrary, their respective official duties are minutely set forth in the national or state constitution or statutes, or in the city charter and ordinances; so that all that they have to do is to study the laws relating to their positions, do what the law requires of them, and do it in the manner prescribed in the law. In other words, their duties are purely ministerial, involving practically no opportunity for the exercise of discretionary authority. In this category fall such officers as secretary of state,[1] state engineer and surveyor, state superintendent of public instruction, state treasurer and comptroller, county auditors or comptrollers, sheriffs, county clerks and court clerks, city clerks and city treasurers, and a host of others whose candidacies now encumber our ballots. Choosing them by popular election yields no advantage which is not more than offset by the evils traceable to the resulting lengthening of the ballot. Moreover, the inability of the average citizen to attend to the work of selecting candidates for so many offices has been largely responsible for the rise of a class of professional politicians who make it their business to attend to precisely that sort of thing. Although it is customary to sneer at the political experts called professional politicians, they are nevertheless indispensable so long as we continue to confuse multiplicity of elective offices with genuinely democratic government. But the fact is that many, if not most, of our elections now mean little more than the ratification of one or the other of two slates of candidates previously arranged by irresponsible and unofficial experts, operating more or less in secret.

The recent adoption of commission and manager government in several hundred cities has been accompanied by a noteworthy reduction in the number of elective municipal officers. In state and county governments, however, comparatively slight progress toward a shorter ballot has been made. This is partly due to the

[1] The national government presents no difficulty at this point; hence only state and local offices need be spoken of.

fact that constitutional amendments are necessary before many elective offices can be converted into appointive ones, and it is also to be explained by the unrelenting opposition of most professional politicians to changes which obviously would materially lessen their importance and power.[1]

4. Plurality elections

The last of the several criticisms of our system of elections mentioned above is directed against plurality elections. It is a principle of democratic government that elective offices shall be filled in accordance with the wishes of a majority of the voters. Our well-nigh universal system of plurality elections often violates this principle; for, whenever there are three or more candidates for a single office, the successful candidate is very likely to be elected by only a minority of the voters. In national, state, and county elections practically nothing has been accomplished toward a remedy of this situation. In city elections, however, a solution has been found in the principle of preferential voting. Since 1909 more than fifty cities, including Cleveland, San Francisco, and Jersey City, have done away with primary elections and have substituted nomination by petition, followed by the use of a preferential ballot on election day. On this ballot names of candidates are grouped by offices, as in the Massachusetts type of ballot, but at the right of each candidate's name are three columns in which the voter may express his first, second, and third choices, although he is not permitted to express more than one choice for the same candidate and is not required to indicate more than his first choice. If any candidate is found to have received a majority of the first-choice votes, he is at once declared elected. If no one has a majority, the result is usually determined by adding the second-choice votes to the first-choice ones. If even then no candidate has a majority, to the first- and second-choice votes are added the third choices, and the candidate who now has the *highest* number is declared elected. In behalf of preferential voting, perhaps the most impressive claims advanced are that it comes nearer to election by absolute majority than any other system yet devised; that, by giving each voter a much wider range of choice among candidates, it tends to emphasize issues rather than personalities, and thus to eliminate personal attacks and recriminations; and that it obviates the necessity of bringing the voters to the polls on two different days, and hence

Preferential ballot

[1] Some states have shortened the ballot in presidential elections by omitting the names of presidential electors. Names of presidential and vice-presidential candidates appear on the ballot, and the governor issues a certificate of election to the electors of the party which carries the state.

CHAP. XLII

makes possible the abolition of the cumbersome and expensive primary system.[1]

Accountability of public officials

In whatever way state and local officers are chosen, whether by appointment or by popular election, whether by means of a partisan or a non-partisan ballot, it is essential to genuinely democratic government that all such officials shall not only be legally responsible to the electorate but have a lively and continuing sense of that responsibility. How, it has been asked over and over during the past few years, can public officials be made to realize that they must exercise the powers of their respective offices not for the advantage of any special interest or political machine, nor for the benefit of any single class in the community, but in the interest of all the people? If a legislative, administrative, or judicial officer proves unfaithful, incompetent, or otherwise unworthy of public confidence, what is the best means of getting rid of him? The perfectly obvious answer is, of course, refusal to reëlect him when his term of office expires. Another almost equally obvious answer in the case of appointive officials is to bring pressure to bear upon the appointing officer to remove the unworthy appointee. In our discussion of the state executive, however, it was explained that the governor's power of removal is often so hedged about as to be a very ineffective means of enforcing a sense of responsibility on the part of high appointive state officers; and much the same sort of situation exists with respect to the removal of many appointive county and local officers. Impeachment of the principal elective state officers, including judges, is authorized in nearly every state constitution; while, in the case of judges, about one-third of the states provide a farther method of removal by action of the legislature.[2] Provision is also made in several states for the indictment, trial by jury, and removal, upon conviction, of certain elective officers who have been guilty of grave derelictions of duty. On the whole, however, it has to be admitted that all of these methods of enforcing a sense of accountability to the electorate are so slow and cumbersome as to be practically unworkable and entirely inadequate save in the most flagrant cases of malfeasance.[3]

Ways of enforcing responsibility

[1] R. M. Hull, "Preferential Voting and How It Works," *Nat. Mun. Rev.*, I, 386-399 (July, 1912); L. J. Johnson, "Preferential Voting," *ibid.*, III, 83-92 (Jan., 1914), and "The Preferential Ballot as a Substitute for the Direct Primary," 63rd Cong., 3rd Sess., *Sen. Doc.* No. 985 (1915).

[2] See p. 683.

[3] C. Kettleborough, "Removal of Public Officers: A Ten Year's Review," *Amer. Polit. Sci. Rev.*, VIII, 621-629 (Nov., 1914).

The recall

Almost a dozen states, losing patience with these older methods of enforcing responsibility, have adopted a much more summary mode of removal, namely, a special election in which an officer may be removed by popular vote. The recall, as this process is termed, made its first appearance in this country in the municipal charter of Los Angeles in 1903. From there it has been extended, in one form or another, to cover state officers in eleven states.[1] It has also been made a prominent feature of the commission form of city government in most states in which that system is authorized. As a rule, the device is made applicable only to elective offices, although in some cases it has been extended to appointive ones as well, on the ground that many such offices are as important politically as many elective ones.

The procedure customarily employed in bringing about removal by a recall can be briefly explained. A petition containing a statement of the charges against the official whose removal is sought, signed by a specified percentage of the qualified voters, is filed with some officer designated by law. If the petition is found to be in conformity with the legal requirements, a date is set for the removal, or "recall," election, usually thirty or forty days after the petition has been filed. The officer whose recall is sought may avoid actual recall by resigning within a certain number of days after the filing of the petition; or he may be a candidate to succeed himself and, unless he requests otherwise, his name will be placed upon the ballot without formal nomination. Other candidates may be nominated, usually by petition, and the recall election is conducted in practically the same manner as any other election. The candidate who receives the highest number of votes wins. If he is the incumbent, he remains in office and is said to be vindicated; if a rival candidate polls the highest vote, he serves during the remainder of the term and the incumbent is said to be "recalled." It is usually provided that no petition for a recall election may be filed until an official has been in office for a stated period, commonly six months. As a rule, a second recall election cannot be ordered during the term for which the officer was elected.

Merits of the recall

The chief claim put forward in support of this drastic method of getting rid of unsatisfactory office-holders is that, in view of the ease with which it may be set in operation, it is far more effective

[1] Oregon (1908), California (1911), Colorado, Washington, Idaho, Nevada, and Arizona (1912), Michigan (1913), Louisiana, North Dakota, and Kansas (1914).

in bringing home to public officials a proper sense of responsibility to the people than any of the older methods of removal enumerated above. Faced by the possibility of being recalled at almost any time before the end of his term, no official can feel free to cut loose from his constituents in the consciousness that he is practically certain to serve out his full term. The device also tends to substitute a healthy sense of accountability to the public for an all too common sense of dependence upon political bosses and machines. Finally, not the least important merit claimed is that the recall makes it safe to lengthen the term of most public officers, thus reducing the frequency and cost of elections, and at the same time permitting officials to become more efficient in performing their duties and to develop more permanent administrative policies.

The recall in operation

Contrary to the predictions of most conservatives, the use thus far made of the recall has been moderate. Practically all instances of resort to it have occurred in connection with city governments. Until the successful recall of the governor, commissioner of agriculture, and attorney-general in North Dakota, in 1921, the recall had never been employed for the removal of officers elected by the voters of an entire state. It is not known exactly how many recall elections have been held throughout the country, nor exactly how many officials have been removed from office in this way, nor yet how many unsuccessful efforts have been made to bring about a recall election. But as nearly as can be estimated, not over sixty officers have been recalled in a total of approximately one hundred and twenty recall elections covering a period of a little less than twenty years.[1]

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PART V. LOCAL GOVERNMENT AND ADMINISTRATION

CHAPTER XLIII

THE COUNTY AND ITS GOVERNMENT

Relation between the states and the local government areas

As has been apparent throughout the preceding group of chapters, it is but a step from the government of the state to the government of the county, city, town, township, village, or other local political division. Every such area has been authorized and established by state authority; its powers and functions, and to a large degree its organization, are such as the state confers or prescribes; and the state utilizes practically all local government machinery in the enforcement of its laws, the collection of its revenues, and the performance of its multifold administrative functions. The relation between the state and its subdivisions is totally different from that existing, on the other side, between the state and the United States. In the latter case, the smaller area is not, except in some more or less incidental ways, an administrative division existing for the use and convenience of the larger; on the contrary, it is, within limits, a separate, sovereign area of government, on a footing with the nation itself. The county, city, and township, however, while organized partly to meet the demand for local control of local affairs, exist by no original or inherent right, have no reserved or residual powers, and can be altered, or even abolished, by the state at will. In other words, the United States is organized on a federal basis, while the governmental system of each state is strictly unitary.

Having studied the state governments in those aspects that are, speaking broadly, general and state-wide, we come now to some consideration of the various forms of local government that have established themselves among us—a subject of the greater importance because local government not only costs the average citizen more than the government of either nation or state as such but, in general, touches his daily life more closely.

In an earlier chapter we have seen that two distinct types of

CHAP. XLIII

Early types of local organization

local government arose in the seaboard colonies before the Revolution, one of them in New England and the other south of the Potomac; and that in the middle colonies a mixed type developed, embracing both features found in the New England town and others characteristic of the southern county.[1] These two or three systems served their purpose so well that when independence was achieved few and slight changes were made in them. Indeed, in most respects they are about the same to-day as a century and a half ago. Such alterations as have been made pertain, not so much to structural arrangements, as to the methods of choosing the local officers and to the supervision of these officers by the state authorities.

Spread of county and township government

As the nation expanded westward after the Revolution, the settlers from the older eastern states, moving, as a rule, along parallels of latitude, transplanted in the new states the system of local government with which the majority in each case had been most familiar in the old home-state. Hence the county is the principal unit of local government in southern and south central states, while the combined county-township system predominates in the north central states. In Michigan, Illinois, Wisconsin, and Minnesota, whose early settlers came mainly from New York and New England, the township is the more important area. On the other hand, in states whose first white inhabitants came largely from the south, *e.g.*, Ohio, Indiana, Kansas, and Nebraska, the county preponderates. Sometimes two lines of migration, one from the old South and the other from the old North, meeting in a single state, have resulted in a compromise whereby the inhabitants of each county are permitted to decide for themselves whether they will subdivide the county into townships or retain the county unit intact. This has happened both in Illinois and Nebraska. In the former, eighty-five out of the 102 counties have adopted the township system; in the latter, forty-four out of a total of 93.

Other changes since the Revolution

In addition to this transplanting and readaptation of older local government institutions in the western country, three main developments since the Revolution are to be noted. The first may be described as the democratizing of local government, including both the conversion of appointive offices into elective offices and the broadening of the suffrage. These changes naturally accompanied similar steps in connection with state offices, already described. The second development is the growth of cities, giving

[1] Chap. VIII.

rise to many of our most urgent and difficult problems of local government to-day. This phenomenon appeared in the first half of the nineteenth century and to date shows no sign of being permanently checked. Of late there has been a marked tendency in some sections of the country to subdivide cities, townships, or counties, or to combine the whole or portions of two or more of these local government areas into new municipal corporations, under varying names, for the more effectual carrying on of some community enterprise. A third development is no less important. Although the principal local officials continue to be chosen almost uniformly throughout the country by popular election, with no intervention from the state authorities, their official activities are being more and more strictly defined by state laws imposing specific duties upon them, and are being increasingly circumscribed by state supervision over them in the performance of their duties. These tendencies are especially to be noted in the administration of public education, the enforcement of regulations pertaining to public health, and the collection and expenditure of local taxes and other revenues. Numerous illustrations will appear as we proceed.

The county: general features

The largest, although not necessarily the most important, local government area is, in every state except Louisiana, the county; there the principal political subdivision, corresponding to the county elsewhere, is the parish. Most states have from sixty to one hundred counties. In Delaware and Rhode Island, however, there are only three and five, respectively, while in Texas there are 253. Massachusetts, with fourteen, has the smallest number in proportion to population.[1] Bristol county, Rhode Island, and Custer county, Montana, have the distinction of being, respectively, the smallest and the largest of counties, the former having an area of only twenty-five square miles, while the latter comprises 20,175 square miles, an area almost equal to that of Massachusetts, Connecticut, and New Hampshire combined. The most common areas are between four hundred and six hundred square miles. In population, also, there is great variation, running all the way from Cochran county in Texas, which at the census of 1920 had only sixty-five inhabitants, up to New York county with over two and a half millions, and Cook county, Illinois, with almost three millions. The majority have populations somewhere between ten and thirty thousand. The greater number are rural in character;

[1] In 1920 there were 3,037 counties in all.

CHAP. XLIII

hardly more than one-sixth have one or more urban communities of over 8,000 inhabitants.

County functions

The county has been well termed the "dark continent of American politics," for the average citizen takes little interest in, and knows almost nothing about, his county government and its activities. Nevertheless, the county is, from a number of points of view, a very important governmental unit. (1) It is a much used unit for the administration of state laws, especially such as relate to police and taxation. (2) It is a leading area of judicial administration, being the sphere of the county court, the surrogate or probate court, and the officials connected therewith, notably the sheriff and the prosecuting attorney. Minor civil and criminal actions may be carried on appeal from the city and rural justice courts to the county court, while almost all important law-suits and prosecutions for serious criminal offenses are begun in that tribunal. Every county maintains a court-house and at least one penal or correctional institution. (3) The county is an important recording agency for a large variety of documents, including deeds and mortgages, surveys of land plats, wills, and other court records. (4) Outside of New England, the county is an important district for school purposes, with an elective superintendent of schools who exercises more or less supervision over public schools apart from those situated in separately administered municipalities. Since 1910 the establishment of free county circulating libraries for the benefit of people in the rural sections and in small towns or villages has been authorized in about a dozen states, including California, where not far from thirty county libraries were recently to be found.[1] (5) The county, in most sections of the country, is the principal agency for laying out and repairing highways and constructing and maintaining bridges. (6) The charitable or welfare work done by counties constitutes one of their most important functions in many parts of the country. The county poor-farm or almshouse is a familiar institution outside of New England, and not altogether unknown there. In populous counties, one not infrequently finds county hospitals, and a variety of other welfare activities are carried on under the auspices of the county government. In Cook county, Illinois, for example, about one-half of the total county budget, which in recent years has aggregated approximately twenty million dollars, has gone for charitable or welfare

[1] W. A. Dwyer, "Putting Character into Counties," *World's Work*, XXX, 604-613 (Sept., 1915).

activities of one kind or another. County hospitals in rural counties have been established or authorized in about a dozen states, beginning with Iowa in 1909. (7) In a number of respects the county is an important political unit: the selection of polling-places, the appointment of election officials, and canvassing the votes cast at primaries and elections are county functions in most states. Counties are also units of representation in one or both branches of the state legislature; they are important units in the state party organizations; and, lastly, they have often been convenient subdivisions for determining questions of public policy, such as authorizing or prohibiting the sale of liquor under local option laws.

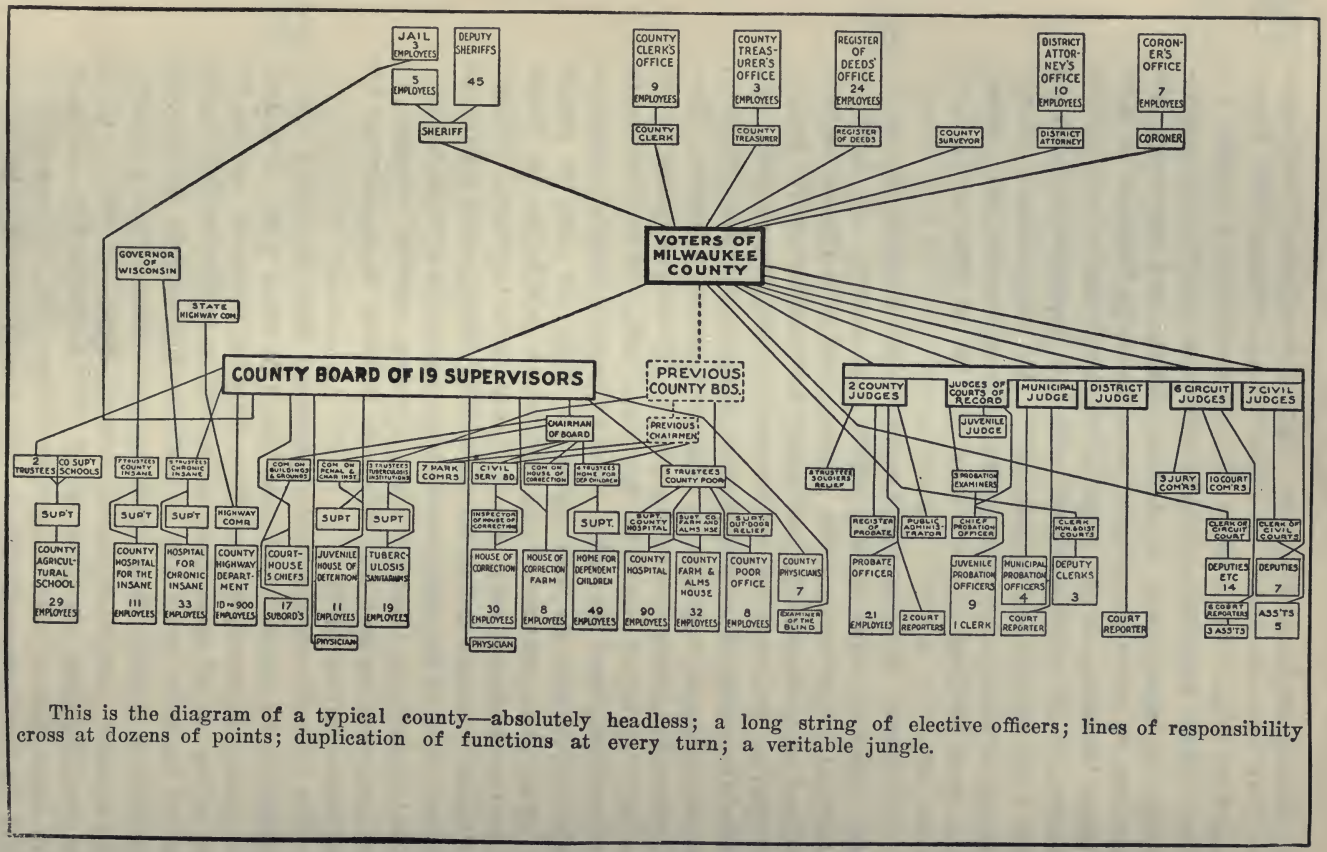
Legal status

The county, like the city, is a governmental subdivision of the state, endowed with certain rights and powers. As a quasi-municipal corporation, it can acquire, hold, and dispose of both real and personal property, make contracts, and sue and be sued in the courts. Its corporate powers are, however, less extensive and varied than those of an ordinary city, being indeed quite incidental and secondary in importance to its governmental functions. Furthermore, its powers are seldom granted in a single document like the city charter or a general municipal code, but are usually to be found scattered through a score or more of statutes passed at different times by the state legislature. Like the city, the county is legally the creature of the legislature, which, in the North Atlantic states and some others, is quite free to create, combine, or abolish counties and to extend or limit their powers regardless of the wishes of the inhabitants and unhampered by any constitutional limitations. In most states, however, counties are more or less protected against legislative annihilation or impairment by constitutional provisions.

Restrictions on counties

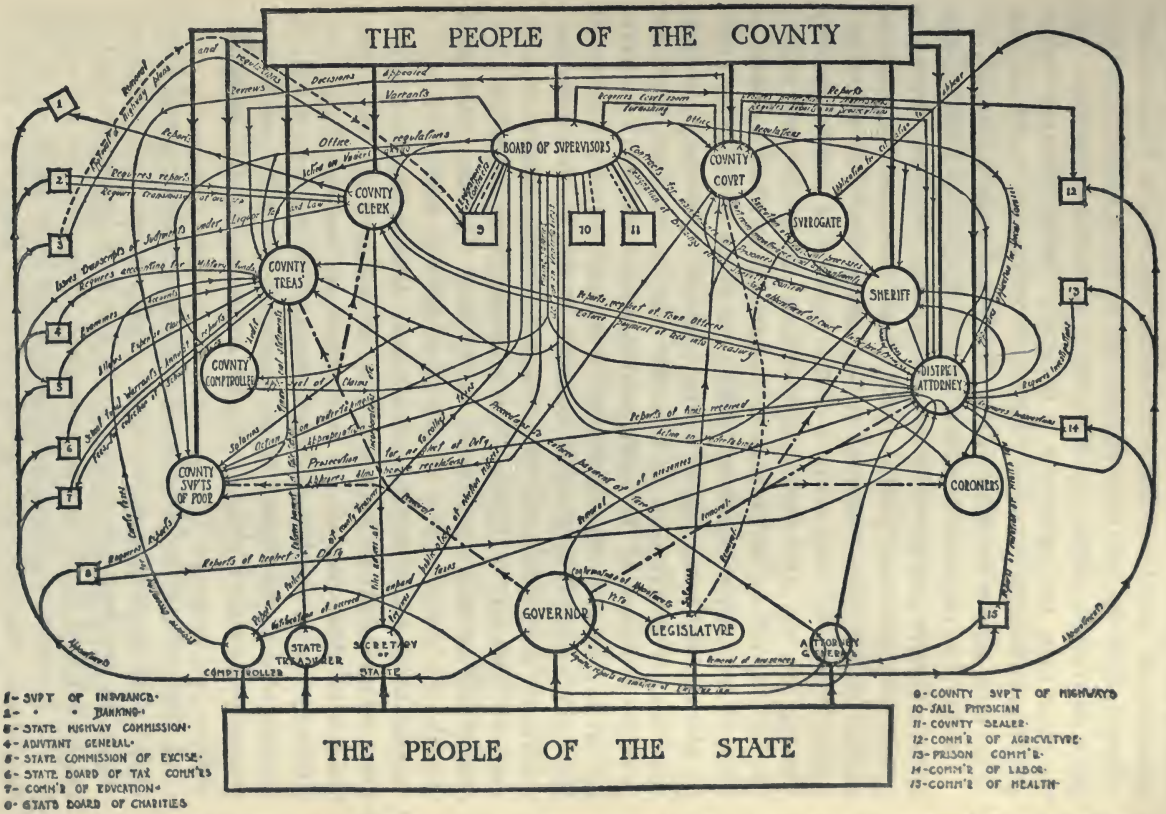
Not only do constitutional stipulations limit the power of the legislature in dealing with counties; frequently they also limit the power of counties themselves. Among the most common of the latter sort of restrictions are provisions setting a limit to the rate of taxation which may be authorized by county officials and prohibiting counties from incurring indebtedness beyond a specified amount. Not infrequently, however, these debt limits may be exceeded for some particular object after special authorization by the legislature or after a popular referendum. The powers of both the legislature and the county are farther curtailed in about two-thirds of the states by constitutional provisions specifically

GOVERNMENT OF MILWAUKEE COUNTY, WISCONSIN[1]



This is the diagram of a typical county—absolutely headless; a long string of elective officers; lines of responsibility cross at dozens of points; duplication of functions at every turn; a veritable jungle.

Courtesy of the Milwaukee City Club



This is a New York County—All Officers Elected Independently of Each Other and Co-ordinated Theoretically by Elaborate Laws. Headless, Irresponsible, Inefficient, Obscure.

Courtesy of the National Municipal League

CHAP. XLIII

naming the officers which each county must have and fixing the amount and method of their compensation. None of the offices thus provided for can be abolished, nor may the method of filling them be changed, either by the county or by the legislature. At the same time, the legislature is generally free to create as many additional offices as it sees fit. Herein, it will be perceived, lies one of the most serious obstacles to the adoption of a shorter ballot.

Haphazard organization of county government

To the governmental organization of counties very little thought appears to have been given by constitutional conventions, state legislatures, or the general public, at all events in comparison with the amount of attention bestowed on the governments of states and cities. There is everywhere a large number of elective county officials, but no discrimination has been made between policy-determining offices, which may appropriately be filled by popular election, and purely ministerial offices, the filling of which by popular election serves no useful public purpose. Curiously, furthermore, county government all over the country has been organized in entire disregard of the traditional three-fold division of governmental powers, with its concomitant system of checks and balances. Not even formal lip-service is rendered to this historic principle; practically no attempt has been made to create distinct or independent judicial, legislative, or administrative branches. The county courts which one finds everywhere, together with their officials, are merely parts of the state judicial machinery, not a coördinate branch of county government. County legislative functions, which indeed are extremely few, are assigned to a body whose main work, like that of the commission in commission-governed cities, is almost wholly administrative. This agency, commonly known as the county board, comes nearest to being the central governing body; and it, chiefly, calls for somewhat detailed consideration.

The board of county commissioners or supervisors

A county board is found in all states except Georgia and Rhode Island, and is everywhere an elective body, except in Connecticut, where the members are appointed by the state legislature, and in the majority of South Carolina counties, where they are appointed by the governor on recommendation of the local members of the legislature. The usual term is two years. The board bears different names in different parts of the country, and its composition varies greatly in different states. Where there are townships, and in some other states as well, it is called the board of supervisors; in states or counties without township government it is commonly

known as the board of county commissioners. Sometimes boards of supervisors and boards of commissioners are found in the same state, as in Illinois, where eighty-four counties have the former and seventeen counties the latter, while a special board has been created for Cook county.

A board of supervisors is composed of representatives elected from the various towns and cities in the county, one generally being chosen from each town or city ward. Seldom is there any attempt to apportion representation on a population basis, although something has been done in this direction in Illinois, where one supervisor is allotted to every township, regardless of size, and an assistant supervisor to each town with more than four thousand population, with an additional assistant supervisor for every twenty-five hundred inhabitants in excess of four thousand. This results in many large boards, eighteen Illinois counties having boards with thirty or more members, while in one county (La Salle) the board numbers fifty-three. Such large boards are, however, found in only five or six other states, including New York, Michigan, and Wisconsin.[1] In the majority of states, on the other hand, there are small boards of county commissioners consisting of three, five, or seven members, elected from the county at large in Ohio, Pennsylvania, Maryland, and South Dakota, and chosen in districts into which the county is subdivided in Indiana, Iowa, Minnesota, Kansas, Nebraska, and North Dakota.[2]

Absence of a chief executive

Almost nowhere is there any chief executive officer in the county board; each board elects its own chairman, but he has no veto upon the acts of the board and little, if any, more power in other respects than any other member. Exceptions are to be found in the president of the Cook county board in Illinois, who is elected directly to that office by the voters, who has a veto upon the acts of the board, including appropriations, and who also has important appointing powers; and in the county supervisor in Essex and Hudson counties, New Jersey, who is similarly chosen and has much the same authority. But the possibilities of leadership and control connected with these positions have never been developed by any incumbent in either Illinois or New Jersey.

[1] The legislature of Wisconsin passed a law in 1921 permitting counties to adopt, in place of the large board of supervisors, a governing body of five commissioners, elected in rotation from districts of substantially equal population.

[2] Called supervisors in Iowa and Nebraska.

CHAP. XLIII

Powers of the county board:

Like city councils, county boards, in general, may exercise only such powers as are expressly conferred on them by statute or are clearly necessary to the performance of their public functions. Even in the same state, county boards will sometimes be found with greatly varying powers, owing to the large amount of special county legislation which has been enacted from time to time. The county board is, however, for most purposes the general public agent by which the powers of the county are exercised; and a detailed study of the work of these bodies throughout the country will show that commonly, though not in every state, their duties and powers relate to (1) financial matters, (2) county property and public works, (3) elections, (4) charities, (5) the appointment and supervision of county officers, and (6) a large variety of miscellaneous matters.

1. Finance

The financial activities of the county board include levying taxes for county purposes; levying the county's share of the general property tax for the support of the state government; authorizing and arranging for loans on the credit of the county, usually through bond issues; equalizing, in many states, the assessment of taxes among the different townships and cities in the county; serving, in some states, as a board of review to hear and decide appeals of taxpayers from property valuations made by local assessors; passing upon the allowance of all bills and accounts against the county, where there is no separate county auditor or comptroller; fixing the salary or other compensation of minor county officials and employees; and, in practically all states, making appropriations of county funds for various county purposes.

2. Custody of county property

The county board is the official custodian or trustee of all county property, real and personal, including the court-house, jail, work-house, poor-farm or almshouse, hospitals, and libraries, and is required to lease or erect buildings suitable for the use of all county officers. In some sections of the country the board also undertakes various public works, such as locating, constructing, and repairing the most important roads, building the principal bridges, erecting levees or dikes, and constructing drains, ditches, and irrigation works.

3. Control of elections

In most states outside of New England the county board marks out voting precincts, designates polling places, appoints election officials, prepares, prints, and distributes the ballots used on primary and election days, and, after the polls have closed, serves as a board to canvass the results of primaries and elections, which are certified by it to the proper county and state officers.

For the charitable and other welfare work of the county the county board is ultimately responsible. The administration of the poor-farm or the almshouse, the county hospital, and other similar institutions, and the carrying on of varied forms of welfare activity, come within its general jurisdiction, although the actual management of these institutions may be delegated to other elective or appointive officials. Frequently the patronage attached to the poor relief and charitable work of the county is considerable, subjecting the officials in charge of it to much local pressure, both political and social.

4. Administration of charities

Outside of the most populous counties, the appointing power of the county board is not extensive, and its power of removal is even less so. In one state or another the county board appoints the overseer of the poor, the superintendent of the workhouse, a county attorney, drain or highway commissioners, election boards, a county physician, a county health officer or health board, a "commissioner of Canada thistles," fence viewers, mine inspectors, a county treasurer and an auditor, a superintendent of highways, a county farm adviser, a county engineer, and a purchasing agent. Vacancies occurring in elective county offices may also sometimes be filled by action of the board. In populous counties, where many activities are carried on by the county government, the board is likely to have the power to fill a very large number of positions on the county payroll,[1] and the appointments frequently show the spoils system at its worst. In some large counties, however, this evil has been to some extent eliminated or reduced by the introduction of merit principles.

5. Appointments

Over the elective county officials and their immediate subordinates, the county board has very slight power, either of control or supervision. Such power as it does have usually takes the form of approving bonds required of newly elected officials, examining the accounts of certain officers, fixing salaries, removing the county treasurer, hearing complaints against officers and removing them if misconduct is proved. But, in the main, the board has no effective control over the county administration: it can seldom demand information in writing from any official concerning the affairs of his office, and its control over salaries and appropriations is rarely employed as a means of effective control.

The miscellaneous matters falling to county boards include the issuing of licenses for certain trades or occupations, such as liquor-

6. Miscellaneous

[1] In Cook county, Illinois, there are about one thousand such positions.

CHAP. XLIII

selling, keeping hotels or inns, auctioneering, peddling, and operating ferries; offering bounties for the destruction of wild animals or noxious weeds; regulating fishing; safeguarding grade-crossings; incorporating literary and benevolent societies; preparing lists of persons eligible to serve as jurymen in the courts; serving as a board of health, and as a forest preserve board; and organizing townships, school and road districts, and other county subdivisions created for various purposes.

Other county officers:

Besides the county board, every state except Rhode Island has six or more elective county officers. In Illinois there are from nine to fifteen such officers in most counties, while in Cook county there are nearly eighty, counting the judges of the circuit and superior courts. All of these elective officers are largely independent one of another and of the county board, and usually of the higher state officials as well. In Rhode Island there are only two county officers, the sheriff and the county clerk, both of whom are appointed by the legislature. Of the numerous county officials, with widely varying titles and duties throughout the country, the most important are the sheriff and the prosecuting attorney.

1. Sheriff

The sheriff is found in every state in the Union, and is everywhere an elective official except in Rhode Island. His term is generally two years, although three-year and four-year terms are not uncommon; and in a number of states the constitution makes him ineligible for immediate reëlection. He has the right to appoint an almost unlimited number of deputies, whose powers become the same as his own; and he is made responsible for all their official acts. In some states the sheriff receives a salary. But usually both he and his deputies are paid by fees which, in the largest counties, sometimes count up to tens of thousands of dollars a year. This fact, and the farther circumstance that in such counties a large number of subordinate positions, clerical and otherwise, are connected with the office and generally filled by the sheriff without civil service restrictions, make the office one of the chief prizes for which local politicians strive.

Police duties

The duties most commonly assigned to the sheriff fall into two main groups: those relating to the preservation of the public peace, sometimes called police duties, and those connected with the operation of the courts. On paper, the sheriff's police duties are very extensive. They include the control of the county jail, the arrest and safe-keeping of persons charged with crimes or misdemeanors, and the enforcement of statutes against gambling, vice,

and liquor-selling. Except in some of the more sparsely settled portions of the country, these powers, however, are of limited scope in actual practice. There is no county police, corresponding to city police forces, subject to the sheriff's orders, and the town constables and village and city police forces are in no way subject to his control. In time of public disorder, therefore, the sheriff's power to appoint additional deputies and to summon the *posse comitatus,* or general body of citizens, to aid him in protecting life and property generally amounts to nothing, and he is obliged to call upon the governor of the state for the assistance of the state militia or—where such a body exists—the state police.

Court duties

The greater portion of the sheriff's time is consumed in the performance of duties as the executive agent of the courts. At each session of the county and higher courts he is present, either in person or by deputy; he opens and closes court sessions with a formal proclamation, and maintains a proper degree of decorum; he serves the various writs and other papers in connection with civil suits, and also warrants for the arrest of persons accused of crimes and subpœnas for the attendance of witnesses; he carries out the judgment of the court in civil cases, and executes the sentence of the court upon persons convicted of crimes or misdemeanors. In addition, he is *ex-officio* tax collector in some southern states and in some counties in Illinois, California, and Texas; he sometimes issues proclamations announcing the approach of primaries or elections; and in a few southern states he serves as public administrator of the estates of deceased persons who leave no heirs or relatives.

Although sheriffs are elected locally, they are, in law, agents of the state, and many, if not most, of their functions have to do with the enforcement of state laws. Nevertheless, in but very few states do the higher state officials exercise an effective control over them. In Michigan, New York, and Wisconsin the governor may remove a sheriff for cause; and in Illinois he must remove a sheriff who allows a prisoner to be taken from his custody by a mob.

2. Prosecuting attorney

Of equal or greater importance is the prosecuting attorney, who is known by different titles in different states, such as state's attorney, district attorney, and county solicitor. Generally such an official is elected in each county. But in some states the attorneys are chosen in districts comprising more than one county; in which case their jurisdiction is not restricted to a single county but extends throughout their district. In a very few states the attorney

CHAP. XLIII

is appointed by the governor,[1] or by the judges of some court, as in Connecticut. He is paid a salary in a number of states, and is recompensed with fees in others. But the tendency is to substitute salaries for the fee system.

Duties

The most conspicuous duties of the prosecuting attorney, as the title implies, relate to the enforcement of criminal statutes; and the extent to which crime is repressed depends largely on the ability, energy, good judgment, and character of this official. He investigates crimes which come to his attention through the public press or on complaint of private citizens; he institutes proceedings for the arrest and detention of persons accused or suspected of crimes, and of important witnesses whose departure from the state is anticipated; he commences criminal actions where the facts in his judgment warrant it, either by filing an information with the proper court or by drawing up indictments and submitting evidence in support of them to a grand jury; and he conducts, either in person or by deputy, the trial of criminal cases. To his recommendations concerning the fixing of bail, the discontinuance or nolle-prossing of criminal actions, and the severity of sentences to be imposed, courts generally give serious consideration. His criminal jurisdiction often extends also to public officials as well as to private persons, so that it becomes his duty to bring to trial officers whom he deems guilty of official misconduct or against whom some competent court directs him to proceed. Unfortunately, however, the close political affiliations of prosecuting attorneys with corrupt municipal or other local officials has often led them to ignore or neglect this function.

Demands of the office

The office is indeed one of enormous responsibility, and capable of almost unlimited possibilities for good or evil. Its control, in counties having large cities, is a political prize of tremendous importance to both the law-abiding classes and the criminal and vicious elements interested in lax law-enforcement and a "wide-open town." Election contests for it have at times quite overshadowed in the popular mind the other phases of a municipal or state campaign. "Beyond question such an office should be entrusted to none but a lawyer of eminent attainments who is a citizen of the highest character, interested in the public good, of unquestioned integrity, of exceptional poise, of great personal force, and fearless in the discharge of duty." Not a few men who have

[1] Alabama, Florida, Georgia, and New Mexico.

attained national prominence in public life first won distinction, and later political advancement, through their courageous and efficient administration of the office of prosecuting attorney in counties containing such cities as New York,[1] Chicago, St. Louis, and San Francisco.

In most states the prosecuting attorney also has important civil duties: he is the legal adviser to most, if not all, of the county officials; he draws up and passes upon the validity of county contracts; he institutes and conducts suits brought by the county and defends those brought against the county, or against any officer thereof in his official capacity; he prosecutes all cases of forfeited official or jail bonds; and frequently he coöperates with the attorney-general of the state in the handling of important cases affecting the county.

3. Coroner

The office of coroner is of nearly the same antiquity as that of sheriff, but is now far less important. Almost everywhere the coroner is an elective official, although in six or seven states he is appointed by the county board or by the judges of one of the higher courts. In Rhode Island he is appointed by the town council, and therefore is not a county official at all. The main duty of the coroner, as set forth in a New York statute,[2] is to investigate the circumstances under which any person has died "from criminal violence or by casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner." Elsewhere the scope of the coroner's functions is often somewhat more restricted. In actual practice in most states the office really forms a part of the machinery of criminal justice, and only in cases where a crime is involved, or thought to be involved, do the findings of the coroner or his jury have any special significance. "To perform his duties properly, a coroner should be both a criminal lawyer and a specialized medical expert; but those elected can usually lay claim to neither qualification." In many cities the office is nothing but a booby prize awarded to

[1] The organization and work of the district attorney's office in New York City is interestingly described by a former incumbent, C. A. Whitman, in his article, "The World's Greatest Prosecuting Office," *Rev. of Revs.*, XLIX, 705-713 (June, 1914). Cf. H. S. Gans, "The Public Prosecutor; his Powers, Temptations, and Limitations," *Annals Acad. Polit. and Soc. Sci.*, XLVII, 120-133 (May, 1913).

[2] For illustrations of the trivial duties imposed upon coroners in New York, see *Proceedings of the Conference for the Study and Reform of County Government*, Second Meeting, Jan. 22, 1914.

CHAP. XLIII

some insignificant adherent of the dominant political machine. There should, of course, be the closest harmony and coöperation between the coroner and the prosecuting attorney; but not infrequently the two pull in opposite directions.

4. Clerk

County clerks are found in about one-half of the states. They are usually elected for two-year or four-year terms; but in Rhode Island they are chosen annually by the legislature, and in Vermont they are appointed for an indefinite term by the assistant judges of the county court. In some states the county clerk has a great variety of tasks to perform. In Illinois he is becoming, indeed, the chief executive officer of the county; and in New York he has duties in connection with the administration of at least a score of important state laws.[1] But, as a rule, his functions are neither numerous nor important.

5. Court clerks

In almost all states, even where the county clerk serves as clerk of the county court, there are one or more separately elected or appointed court clerks. Both county clerks and court clerks may appoint deputies for whose official acts they are responsible. Court clerks keep the minutes of court proceedings and orders, and have custody of the records and the court seal. "They docket all cases for trial, filing all papers in each case together. They issue proper processes or writs at the beginning, during, and at the end of each suit; and enter judgments rendered by the court. They certify to the correctness of transcripts from the records of the court; and preserve property and money in the custody of the court. Their duties are for the most part ministerial; but some functions imposed by statute, such as the taxation of costs, the approval of bonds, and the assessment of damages in cases of default, are quasi-judicial."[2]

6. Other county officers

Other appointive or elective county officers, found in one state or another, can be barely mentioned. To describe them would be wearisome; besides, their nature and functions are sufficiently indicated by their names. Among them are the treasurer; auditor or comptroller; register of wills; register of probate; recorder of deeds; jury commissioners; jail commissioners; prison wardens; prison inspectors; jail physicians; mercantile appraisers; election boards; superintendent of schools; director, overseer, or superintendent of the poor; superintendent of the work-house; surveyor;

[1] R. S. Childs, "Ramshackle County Government," *Outlook*, CXIII, 39-45 (May 3, 1916).

[2] J. A. Fairlie, *Local Government in Counties, Towns, and Villages*, 117.

road or highway commissioner; boards of assessors and boards of review.[1]

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[1] For an account of some of these minor offices see J. A. Fairlie, *Local Government in Counties, Towns, and Villages*, Chap. VII; H. G. James, *Local Government in the United States*, Chap. III.

CHAPTER XLIV

CRITICISM AND RECONSTRUCTION OF COUNTY GOVERNMENT

County government not satisfactory

Up to twelve or fifteen years ago, county government was a labyrinth whose by-paths were known only to the professional politicians. Since then, a few disinterested explorers have penetrated the jungle in different states, notably New York, Delaware, and Illinois, and have given to the public some interesting reports of what they have found. These accounts indicate that, in general, the county has been practically untouched by the reform movements which have wrought so effectively for better government in city and state; that no state in the Union has worked out a really good system of county government; that, almost everywhere, cumbersome and antiquated governmental machinery persists, and divided, diffused, and diluted authority and responsibility reign supreme and practically unchallenged. A recent (1917) report of a committee on county government maintained by the National Municipal League declares that "county government is the most backward of all our political units, the most neglected by the public, the most boss-ridden, the least efficiently organized and most corrupt and incompetent, and, by reason of constitutional complications, the most difficult to reform." Doubtless such a sweeping indictment could not be sustained on every count in all parts of the country. But in all of our larger states one or more counties could probably be found in which all of these charges could easily be substantiated; while one or more of the allegations could be proved true of practically every county in any state.

Principal faults:

Specific criticisms of county government fall into four main groups, according as they relate to (1) general characteristics; (2) the county board; (3) other county officers; and (4) miscellaneous phases of administration.

1. Rigid uniformity

With the exception of a few very populous counties, all the counties in a state have the same form of government. This means that small and sparsely settled counties are compelled to maintain a needlessly elaborate and cumbersome governmental organization, whose cost is out of all proportion to the services it renders. Two

Remedies

or more such counties might well be consolidated, so as to save a large part of their annual expenditures. Yet county consolidation is difficult to bring about and is a rare event. A possible alternative is the classification of counties, with a view to a uniform scheme of government only for those counties belonging to the same class. Counties are, indeed, now classified in Illinois, Pennsylvania, and some other states for state administrative or legislative purposes, but not for governmental organization.

Another alternative would be to institute a system of optional county charters, analogous to the optional city charter system,[1] thereby enabling each county to adopt, by popular referendum, any one of several standard schemes of county government.[2] Still another possibility takes the form of county home-rule charters. Under this plan the voters of a county elect a charter commission to draft a county charter, subject to the state constitution and statutes and to the approval of the voters. This plan is analogous to the well-developed municipal home-rule charter system. It, however, has gained comparatively slight headway, only two states having adopted it—California, by constitutional amendment, in 1911, and Maryland, in a similar way, in 1915. Four California counties, Los Angeles and San Bernardino (1913) and Butte and Tehama (1917), have framed home-rule charters under which their organization has been considerably simplified and unified, although constitutional obstacles have prevented more thoroughgoing changes.[3]

2. Excessively large county boards;

The county boards of supervisors in some states, especially New York, Illinois, and Michigan, are too large. The large county board has in the past been supported on the theory that it is the legislative branch of county government and therefore should be representative of all important subdivisions of the county. In point of fact, however, the board has, except in Michigan, practically no legislative power beyond the right to levy taxes and make appropriations; the remainder of its work consists almost entirely of administration.

[1] See p. 751.

[2] The new constitution adopted in Louisiana in 1921 authorizes optional forms of parochial (county) governments.

[3] An important step in the direction of county home-rule was taken in New York in 1921, when a constitutional amendment was adopted empowering the legislature to provide for new forms of government for Westchester and Nassau counties, subject to the approval of the voters in each county. See R. Moses, "Home Rule for Two New York Counties," *Nat. Mun. Rev.*, XI, 5-7 (Jan., 1922).

CHAP. XLIV

The objections to a large board are several. In the first place, such a body, made up of members from all parts of the county, can meet only at comparatively infrequent intervals, and so is not in continuous touch with what is going on in the various county offices and institutions; and rarely can it act with a proper degree of promptness. The running of a county is a complex administrative problem, requiring constant and active supervision. In the second place, a large board is unwieldy as an administrative body, and is therefore obliged to leave much to be done by virtually irresponsible committees.[1] These are usually appointed by the chairman of the board, and not infrequently are made up, on a strictly partisan basis, with the chairman appointed under a seniority rule which often leaves the best qualified men in positions of little or no influence. These committees look after various branches of the county administration and make their reports and recommendations to the full board, which generally accepts and approves the action of a committee in the most perfunctory manner. If the board as a whole attempts to consider in detail any phase of county work, it soon degenerates into a debating society. In the third place, no executive head is charged with the duty of supervising and correlating the work of these committees and keeping the board informed on the needs and transactions of the various county offices; for, aside from his right to make committee assignments, the chairman of the board, with but few exceptions, has no more power than other members. Lastly, individual members of the board of supervisors are selected primarily to serve as township officers. They are county officials only secondarily. Hence there is every incentive to serve their township first; as a result, log-rolling and other evils characteristic of the ward system of selecting city councilmen abound.

Remedies

One prerequisite, therefore, of more efficient county government is the abolition of the large board of supervisors and the substitution of a small body of from three to seven members, elected either at large or from a very few districts. If made alone, however, this change might not result in any conspicuous improvement; there must also be a considerable enlargement of the board's powers. In one particular after another, county boards throughout the country have had their discretionary powers taken away by mandatory statutes imposing specific duties upon them. Yet

[1] In ten Illinois counties the number of committees runs from thirteen to twenty-six.

they are capable of being made to serve very useful purposes in our system of government, performing for the rural portions of the state many of the functions which city governments perform for urban populations, but which are beyond the resources of most towns and villages. The boards' powers of appointment and removal, and especially their legislative powers, might well be increased; greater liberty on their part to make local laws would relieve the state authorities of many burdensome duties now oftentimes very indifferently performed. In other words, counties might well be granted a much larger degree of home-rule in matters that do not transcend county boundaries. Michigan is practically the only state in which any noteworthy beginning has been made in this direction. By the constitution and statutes of that state, county boards have been given full power "to pass such laws, regulations, and ordinances, relating to purely county affairs, as they see fit, but which shall not interfere with the local affairs" of any township, city, or village within the county. Legislation passed by Michigan county boards must be submitted to the governor, and may be vetoed by him; but the board can override a veto by a two-thirds vote.

3. Undesirable multiplicity of elective offices

With respect to the other county officers, it has been repeatedly pointed out that too many of them are elective, thus lengthening the ballot and tending to confuse the voter on election day. Perhaps it would be more correct to say that the voter, instead of being confused, merely votes blindly for the county ticket of one party or another. Few, if any, of these elective county offices have any political significance; that is, they involve no power to determine what the county government shall do. They are almost wholly administrative, and the duties of their incumbents are more or less minutely set forth in the state laws; all that these persons have to do is to find out the law relating to their particular office, and to execute it in the manner prescribed. Such offices, by their very nature, ought to be filled by appointment. So long as they remain elective, county officials will continue to be chosen on a partisan basis, presumptively with reference to their views on the tariff, immigration, the League of Nations, or American relations with Mexico, although their views on these national questions seem to many people to have about as much relation to county problems as their opinions on Calvinism or the nebular hypothesis. As a matter of fact, there is no Republican or Democratic way of performing the duties of county treasurer, or sheriff, or prosecuting attorney,

CHAP. XLIV

or county clerk. In California and in Milwaukee county, Wisconsin, all county officials are nominated and elected upon a non-partisan ballot. Unless, however, the number of elective county officers is greatly reduced, the benefits which are promised from non-partisan elections are likely to be disappointing.

Proposed arrangements for appointment

To be specific, there should be a small elective county board, with greatly enlarged powers of legislation, appointment, and removal, and chosen on a non-partisan ballot if local conditions hold out any real prospect of genuine non-partisan choice. All other county officers, with the possible exception of the auditor or comptroller, should be made appointive. The coroner, in particular, should cease to be an elective official. The modern history of that ancient office is indeed "a story of political degeneracy." The example of Massachusetts, Maine, and New York City in substituting for the coroner an appointive medical examiner, who acts in close coöperation with the prosecuting attorney, should be universally followed.[1]

If these county offices ceased to be elective, where should the appointing power be lodged? The answer is that it should be distributed according to the nature of the work to be performed. First of all, the state should not only appoint but pay all so-called county officers whose chief, if not only, duty is to enforce state laws for the suppression and punishment of vice and crime, precisely as the national government appoints and pays the corresponding national officials, *i.e.*, the United States marshals, commissioners, district attorneys, and district judges. The work of the sheriff, prosecuting attorney, and county judge is really not county work at all, except geographically; in nature, it is state work. Although elected by the people of the county, these officers serve the people of the state as a whole. Their appointment, compensation, and removal by the state would have the advantage of preventing the local nullification of state laws which is now so common, and would throw upon the state legislature the burden of facing any public hostility to unpopular laws. The sheriff should be appointed and made removable by the governor; the prosecuting attorney, either by the governor or by the attorney-general of the state, preferably the latter. On the other hand, clerks of courts should be appointed by the courts which they serve; and county treasurers and collec-

[1] C. Morris, "The Medical Examiner versus the Coroner" [in New York City], *Nat. Mun. Rev.*, IX, 498-504 (Aug., 1920).

tors, assessors, superintendents of schools,[1] and all other purely county officials should be appointed, directly or indirectly, and made removable, by the county board. At the same time, all subordinates and county employees should be selected, promoted, and dismissed in accordance with carefully drawn civil service regulations. In a word, the officers having state functions should be appointed and controlled by the state, and the real county officers should be put under the full control of the county board, which would thus become, in a larger measure, the head of the county government. For the first time, responsibility for the administration of county affairs would be properly placed and unified.

Need of a real county executive, or manager

But the reform should not stop here. There ought to be some effective apex to the county organization, as in the case of the city, state, and nation. This can best be supplied by a single executive officer empowered to check waste, correct abuses, institute needed changes or reforms, enforce a proper degree of harmony, coöperation, and subordination, and furnish the essential element of leadership. County boards might profitably follow the example of more than two hundred cities by appointing a manager and delegating to him the supervision of the details of county administration, including full control over subordinate county officials through the power of appointment and removal, subject to proper civil service regulations. The elective county board would then serve as the representative legislative, or policy-determining, body; and its chief functions would be to select a competent county-manager, pass upon the annual budget and tax levy, and enact such local ordinances as might be needed. Commission-manager county government might also properly include such incidents of commission-manager city government as the recall and the initiative and referendum. Nothing short of some such wholesale reorganization will so simplify and unify our present "ramshackle county government" as to make it easily understood by the average citizen. Elective county officials must come to be so few in number and so important and conspicuous that the average voter can mark his ballot intelligently and know who is to blame when things go wrong.[2]

[1] Iowa, in 1913, provided for the election of the county superintendent of schools for a three-year term by a convention consisting of the presidents of all of the local school boards of the county, a three-fourths vote being required to elect.

[2] A plan for the reorganization of the government of Baltimore county,

CHAP. XLIV

4. Miscellaneous criticisms

That things frequently go wrong in county administration, no one will deny. County institutions are often very indifferently managed. Poor-relief and other charitable and welfare activities show urgent need of consolidation under a department with an expert at its head. Inefficiency and needlessly expensive methods prevail in the handling of finances. As a rule, there is nothing worthy of the name of a budgetary system; illegal expenditures, made either in ignorance or in disregard of the law, are not at all uncommon; shortages were discovered not long ago in the accounts of twenty-five out of the sixty-one counties in New York. Often there is lacking anything which an ordinary business man would recognize as an accounting system, and when there is something of the kind it is seldom uniform for all the county offices. In Illinois, and probably most other states, some counties do not even keep a full record of the financial transactions of county officers. Waste and extravagance often characterize the granting of salaries or other forms of compensation by county boards and the purchase of county supplies.[1] When a county board authorizes payment of $108,000 for advertising the sale of lots of land for unpaid taxes amounting to $34,000, or the payment of over $13,000 incidental to the acquisition of $21,000 worth of real estate, as has actually happened, the taxpayers may well feel indignant, even though they are not likely to be able to fix the responsibility.

Financial reforms

The pocket-book nerve is the most sensitive part of the average taxpayer's anatomy, and so it is not surprising to find that important steps have been taken to remedy loose financial methods. In Indiana a specially elected county council has taken over both the taxing and appropriating powers of the county board. In Iowa, Minnesota, Massachusetts, New York, Ohio, and other states, provision has been made by law for state supervision, audit, or inspection of county financial transactions. In New York, for example, the state comptroller has authority to send examiners to any county to investigate and report upon its financial condition. Out of fifty-seven counties visited by such examiners a few years ago, only four

Maryland, was submitted to the voters in November, 1920, and rejected. See H. W. Dodds, "A County-Manager Charter in Maryland," *Nat. Mun. Rev.*, IX, 504-513 (Aug., 1920). A scheme of reorganization along somewhat different lines has recently been proposed for Nassau county, New York. See J. Fleischer, "Nassau County Plans a New Government," *Nat. Mun. Rev.*, VIII, 348-353 (July, 1919).

[1] For recent instances of financial irregularities and waste in Michigan counties, see C. R. Hatten, "The Movement for County Government Reform in Michigan," *Nat. Mun. Rev.*, IX, 696-698 (Nov., 1920).

were found to have accounting methods worthy of favorable comment, and in not a single instance had there been compliance with every provision of state law relating to local financial transactions. New York, Iowa, and a few other states now prescribe uniform systems of accounting for all counties; and about half of the states provide for periodical financial reports from local authorities to some state official, although, obviously, mere reports are of but limited advantage. In not a few instances state supervision has resulted in noteworthy improvement. But much more might be accomplished if legislative appropriations for inspectorial work were more adequate.

City and county

Another serious and costly administrative defect in counties containing large cities is the existence of two sets of officers, county and municipal, who perform the same kinds of services for practically the same people. Perhaps the most striking illustration of this duplication is to be found in the case of Chicago and Cook county. Within the city limits of Chicago reside more than nine-tenths of the people of Cook county, and from them comes an even larger proportion of the county taxes; nevertheless, more than a dozen different activities are absolutely or substantially duplicated. No useful public purpose is served by such an arrangement; the cost of government is greatly augmented,[1] and the lengthened ballot imposes an unnecessary burden upon the voters. The proper remedy in such a case seems to be to place the city outside of the jurisdiction of the county officers, transferring the functions of the latter to the appropriate city departments, and to retain the county government solely for the rural or semi-urban portions of the county. Important steps in this direction have been taken in St. Louis, Denver, San Francisco, and to a less extent in Boston, New York, and Philadelphia.

County surveys

Reorganization of county government and reform of the methods of doing county business will not proceed far in most states before the discovery is made that the county cannot be treated as an isolated unit. Its relations to the townships, the school districts, the villages, and the cities within its limits must be freshly worked out in the most careful and painstaking way, and in some

[1] In the past fifteen years the cost of county government in New York City has increased ninety per cent; its abolition would save a million dollars in salaries alone. On the Chicago-Cook county situation, see Chicago Bureau of Public Efficiency, *Unification of Local Governments in Chicago* (1917). On the situation in other large cities, see *Amer. Polit. Sci. Assoc. Proceedings*, V, 61-121 (1911); VIII, 281-291 (1914).

CHAP. XLIV

states will require extensive readjustment. Such changes ought to be preceded by an expert county survey, similar to the municipal surveys that have preceded the reorganization of many city governments. The survey should cover the relations of the county to the state authorities, on the one hand, and to the various political subdivisions of the county, on the other; the levy and collection of taxes, the equalization of property valuations, auditing control and accounting methods, bonded indebtedness, and purchasing methods; the registration of instruments for the transfer of property, and the care and custody of the records of such transactions; and the proper respective spheres of state, county, and local officials. These and many other matters will have to be gone into most thoroughly, with the possible result that changes will have to be made in cities, townships, and villages if county reorganization is to be carried through successfully.

Even if the people were fully aware of the need for the changes outlined—which they are not—they are, by themselves, not in a position to effect any thoroughgoing renovation. Nevertheless they might accomplish something. A roused public opinion might compel the county board to adopt a sort of self-denying ordinance and graft the managership upon the existing government, as a number of cities and villages have done, without waiting for special authorization from the legislature. A progressive county board might also, without waiting for legislative action, authorize an expert survey of county government and administration similar to that recently made in Delaware under the auspices of the New York Bureau of Municipal Research.[1] Capable and progressive county officers can likewise, on their own initiative, introduce more businesslike methods of handling the work of their respective offices. Sooner or later, however, the county board or the other county officials will be confronted by the necessity of appealing to the legislature for assistance.

Reform through the legislature

It would, indeed, be highly creditable to the legislature not to wait for such appeals, but to take the initiative; for it can do far more than the unaided county authorities in promoting better county government and administration. Probably no legislature is without the power to provide for an expert survey of county government, either throughout the state or in some typical coun-

[1] The results of the Delaware survey are set forth in C. C. Maxey, *County Administration* (New York, 1919). For a similar study of county government in North Carolina, see E. C. Branson et al., *County Government and County Affairs in North Carolina* (Chapel Hill, 1919).

ties; to authorize the employment of county managers or purchasing agents by county boards; to abolish or revise the fee system which still adheres to many county offices; to require a uniform accounting system, periodical financial reports in prescribed forms, and scientific budgetary methods; and to introduce some measure of reform in the assessment and collection of taxes. Furthermore, every legislature could order a codification of all existing laws relating to the duties of the various county and local officers, to be accompanied by a handbook or manual for ready reference. Thus would unskilled officials be relieved of the burden of threading their way through the labyrinth of compiled statutes and confusing session laws in a more or less futile effort to find out what their duties and limitations are—a task which is seldom performed satisfactorily by even the most conscientious. The legislature might also enact a civil service law for the elimination of the spoils system in connection with the subordinate positions on the county payroll, abolish any county offices created by statute and transfer their duties, and change statutory elective offices into appointive offices, thereby hastening the advent of the short ballot.

Reform through constitutional amendments

But even the most intelligent and sympathetic legislature is limited in what it may do to promote better county government. Not only are its hands tied in the shortening of the ballot by constitutional provisions making various offices elective, but it is hampered by provisions which impose a uniform type of government upon all counties, limit the amount and incidence of county taxation, restrict the amount of bonded indebtedness, and require the unnecessary and costly duplication of county and city offices. Nothing less, therefore, than a series of constitutional amendments will clear the way for that simplification and unification of county organization which is essential to truly democratic local government.

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CHAPTER XLV

THE CITY AND ITS CHARTER

"City government," remarks a recent writer, "touches more people at more points and more frequently than any other branch of government." The number of people so affected increases in the United States with remarkable rapidity. In 1800 there were only six cities in the country, and their combined population was a little less than four per cent of the total;[1] in 1890 there were 444 cities, comprising thirty per cent of the aggregate population. In other words, while the population of the country as a whole increased only twelve-fold, the urban population increased eighty-seven-fold, in less than a century. By 1900 a little more than forty per cent, and by 1910 more than forty-six per cent, were reported in the census statistics as living in places of 2,500 inhabitants or more. The census of 1920 showed that a tenth of our total population was at that date to be found in the three cities of New York, Chicago, and Philadelphia; that a quarter of this total population lived in the sixty-eight cities having more than 100,000 inhabitants each; and that considerably more than half of it (51.4 per cent) lived in places of more than 2,500 population. In the past decade cities have increased in population seven and one-half times as fast as non-urban areas.

Growth of urban populations

This impressive increase of urban population is of concern not only to city dwellers themselves, but to rural dwellers as well; many of the conditions and problems which directly affect city folk indirectly affect the welfare of non-urban populations. It is, for example, a matter of more than local, municipal concern if an epidemic breaks out in a large city, or if a city seeks to dispose of its sewage in a stream from which the people along its course draw their water supply, or if the criminal laws are poorly enforced by city authorities, or if city primaries and elections are tumultuous and unfair, or if the financial transactions of a city are characterized by waste and extravagance. No city, indeed—

[1] Until 1900, places having 8,000 inhabitants, or more, were classed as urban communities by the census authorities.

CHAP. XLV

especially if it be one of considerable size—can live unto itself; the welfare, prosperity, and prestige of the cities of a state contribute enormously and in manifold ways to the welfare, prosperity, and prestige of the state as a whole.

Furthermore, in the organization of their government, and in carrying on various municipal activities, cities frequently find themselves handicapped by provisions in the state constitution or statutes, or by the peculiar legal status of cities in our political system; and under such circumstances it becomes incumbent upon the people of the state at large, through a constitutional convention, or the state legislature, or the state administrative departments, to deal with important municipal questions. Coöperation and mutual interest ought always to characterize the political relations of the urban and rural sections of a state, although much too frequently these relations are marred by suspicion, jealousy, and more or less open antagonism. In addition, it should be noted that the coöperation of even the national government not infrequently becomes necessary to the successful promotion of some important municipal undertaking or to the solution of some of the serious social problems arising in our great urban centers, such as sanitation, protection against contagious diseases, poverty, the high cost of living, overcrowding, housing, unemployment, low standards of life, physical degeneracy, and the naturalization and Americanization of alien immigrants. Truly, we are "every one members one of another."

Legal status of cities

A city is a municipal corporation possessing the power to sue and be sued, to acquire, hold, and dispose of property, to enact ordinances, to raise money by taxation, and to exercise the right of eminent domain. Every city has a fundamental law, called the

The city charter

charter, which defines the city's powers, outlines its organs of government, determines the method of choosing the mayor, council, and other officials, assigns to some or all officials their respective duties, and determines with varying degrees of precision the relations of these officials one to another. Some charters deal with these matters in very general terms, leaving to the city large discretion in arranging details by ordinances. But most charters specify with great minuteness everything that a city may do, and hence become, like state constitutions, lengthy and complicated documents; the charter of Greater New York fills about a thousand printed pages.

Subjection to the legislature

Whatever its form and content, a city charter, or the authority to frame one, comes from the state legislature; and since charters differ in no essential respect from other acts of the legislature, that body has the right to grant, withhold, suspend, alter, or revoke a charter at its pleasure, even in defiance of the expressed wishes of the people of the city affected. This form of legal autocracy is, however, tempered more or less by considerations of political expediency, and also by such restrictions upon the power of the legislature as may be found in the national or state constitution. Nevertheless, it should always be borne in mind that, legally, the city, as a municipal corporation, is merely the creature of the state legislature, exercising certain delegated governmental functions, and that therefore it is absolutely under legislative control except in so far as it is protected by constitutional restrictions.

In conferring powers on cities, legislatures have usually been parsimonious rather than prodigal; and this practice, taken with the fact that until recently the courts have been prone to construe charter provisions strictly and narrowly, has in many cases set up serious impediments to proper municipal development. Most cities are compelled to be more or less constant suppliants at the bar of the legislature for additional grants of authority for purposes not clearly covered by the provisions of their charters. The result is a serious encroachment upon the time and energy of the legislature which are needed for the consideration of matters of general, state-wide concern. How serious this encroachment is may be gathered from the fact that in New York between 1910 and 1915, out of a total of 4,260 bills passed by the legislature, 983 were special city bills; while in Massachusetts, from 1905 to 1908, the legislature passed no fewer than 400 special laws relating to the city of Boston alone.[1]

On the other hand, many legislatures have been guilty of unjustifiable acts of aggression upon the domestic affairs of a city. Possessing virtually absolute power over rapidly growing cities, legislatures, early in our history, began to yield to the temptation to abuse their power by interfering in the internal politics and administration of one city after another in a great variety of ways.[1]

[1] See *Amer. Polit. Sci. Rev.*, XI, 534-535 (Aug., 1917); *Nat. Mun. Rev.*, I, 182-194 (Apr., 1912), and II, 597-605 (Oct., 1913); *Mun. Affairs*, VI, 198-220 (June, 1902).

[1] For Pennsylvania examples of this sort of "ripper" legislation, as it is

CHAP. XLV

In some instances such interference has been beneficial to the city or cities affected, and, for a time at least, has been welcomed by the better class of citizens. But whether it has beneficent results or not, the principle is the same; it constitutes an infringement of the theory of home rule in municipal affairs, and is never long accepted with entire complacency.

Charter systems:

Dislike of such interference has found expression since about 1850 in practically all of the state constitutions. Most frequently, remedy has been sought in a clause forbidding the legislature to pass "special acts," *i.e.*, measures affecting a single city rather than all cities of the state, or, at all events, less than all cities of a specified class. In some instances such special legislation has been permitted to continue, but local interests have been safeguarded by giving the city a veto upon it, either through a popular referendum, as in Chicago, or by the action of the mayor and council, as in the cities of New York. Another mode of restriction which has been widely employed, especially in the most recent decades, has to do with the way in which city charters are made. Speaking broadly, five successive methods have been employed, namely, (1) the special charter system, (2) the general charter system, (3) the classification method, (4) the home-rule charter system, and (5) the optional charter plan. Obviously, the basis and character of city government depend largely on who makes the charter and what is put into it. Hence these rival systems must be carefully noted.

1. Special charter system

Where the special charter system prevails, as it still does in Massachusetts and some of the older states, each city has a charter granted to it by special act of the legislature; and there may be as many different varieties of charters as there are cities. The chief merit of this plan is that it enables each city to obtain, if the legislature is willing, the form of government and the corporate powers best suited to its size and general needs. In other words, the system permits adaptation to varying local conditions. On the other hand, it is inherently defective in that the legislature is given practically a free hand to interfere in municipal affairs

commonly called, see *Mun. Affairs*, VI, 212-219 (June, 1902). More recent illustrations are afforded by the action of the New Hampshire legislature of 1921 in transferring the administration of police, streets, highways, and sewers from the city authorities in Manchester to commissions appointed by the governor, and giving to a state commission the right to veto the whole or a part of any appropriations voted by the city government. See *Nat. Mun. Rev.*, X, 310-311 (June, 1921).

at the behest of local political factions or machines or special interests.

2. General charter plan

The general charter system rose out of a reaction against the legislative abuses which have characterized the granting of special charters. For the diversity provided for in the special charter plan the general charter method substitutes uniformity; a state-wide municipal code constitutes the charter for each individual city, and all cities presumably have the same form of government and the same corporate powers. This plan has the obvious merit of simplicity, and it tends to protect the legislature against the temptation to tinker with local government machinery. Nevertheless, even the most perfect municipal code will need amendment from time to time; and experience shows that one city or another will be constantly finding some change essential to its welfare. Hence the system does not, in practice, do away with special legislation for cities or with sheer legislative meddling in local affairs, although this was its original purpose. It has, furthermore, some inherent defects, chiefly an excess of uniformity. If a state contains cities varying greatly in size, as is usually the case, or if some of the municipalities are inland and others are on the coast or on an important waterway, it is difficult, if not impossible, to frame a general code which will satisfactorily meet the needs all around. A form of government and a body of powers adapted to a large commercial city like Cleveland will almost certainly prove a serious misfit for the majority of cities which are much smaller and have entirely different problems. Conversely, if the code is drawn primarily with reference to the needs of these smaller places, it is likely to prove a straight-jacket for the metropolis of the state.[1]

Illinois city and villages act (1872)

Probably the most satisfactory general state law designed to apply to all cities in a state is the Illinois cities and villages act of 1872. Until 1904, practically all Illinois cities, including Chicago, were governed by the provisions of this act as amended from time to time. In that year a constitutional amendment empowered the legislature to pass special legislation relating to the government of Chicago, subject to a referendum of the voters of that city before becoming effective. Yet, in most important respects, the government of this second largest city in the country is still organized under the same law that constitutes the city charter of the smallest

[1] M. R. Maltbie, "Home Rule in Ohio," *Mun. Affairs*, VI, 234-244 (June, 1902).

CHAP. XLV

city in the state. Illinois has, however, fairly well avoided the chief defect of the general charter plan, *i.e.*, rigid uniformity, by prescribing a certain minimum number of city officials for all cities and then empowering the city council of each city to increase the number and to decide whether the new officers shall be elected or appointed. By virtue of this elastic provision, and others, the government of Chicago has been expanded through action of the city council to meet the needs of a great metropolitan community. Nevertheless, despite these and other liberal features of the Illinois act, not only Chicago but many another city in the state finds itself without power to do certain things which would conduce to its welfare, and every legislature is besieged for modifications of the general municipal law.

3. Classification method

The plan of classifying the cities of a state according to population and providing a different kind of charter for each class is a compromise between the two systems thus far described. The importance of taking into account the varying needs of cities differing in size and location is conceded in the provision which is commonly made for three or more classes. The legislature is left practically free to provide for each class whatever form of government, and to grant to the cities in a given class whatever corporate powers, it may see fit; but whatever governmental organization or corporate powers are granted to a class must be granted to all the cities included in that class. The legislature is thus given greater leeway in dealing with cities than under the general charter plan, but is prevented from discriminating against, or in favor of, a particular city,[1] which is the peculiar vice of the special charter system.

New York plan

In New York, where this plan is in operation, the legislature is, however, not prohibited from passing special legislation affecting a single city or less than all the cities belonging to a certain class; but such special laws, before taking effect, must be submitted to the mayor in cities of the first class, and to the mayor and council in other cities. If these local authorities approve the bill, it goes to the governor for his approval or veto; if they disapprove, it goes back to the legislature and must be repassed at the same session and approved by the governor in order to become law. This arrangement has the merit of giving the cities some protection against special legislation and the local authorities some voice in legisla-

[1] Unless, as sometimes happens, a class contains but a single city, *e.g.*, Milwaukee in the Wisconsin system.

tion affecting their cities; but it has by no means cured the evils of special legislation.[1]

Pennsylvania plan

In New York the classification method is expressly provided for in the state constitution, and it operates as a restriction upon the freedom of the legislature. In Pennsylvania, on the other hand, classification has resulted from judicial construction of the constitution and is tantamount to an enlargement of the powers of the legislature. The Pennsylvania constitution of 1873 prohibited the legislature from passing special laws regulating the affairs of cities and other local government units. The supreme court held that it could not have been the intention of the constitution's makers to burden a comparatively small inland city, like Scranton, with a governmental organization and corporate responsibilities primarily adapted to the needs of a great tide-water. manufacturing, and commercial metropolis with more than a million inhabitants, like Philadelphia; or, conversely, to hamper the development and prosperity of Philadelphia by a general municipal code suited to the needs of Scranton and applying alike to all cities in the state. As a result of this decision, the Pennsylvania legislature has felt free to group the cities of that state into three classes and to provide for each class a distinct type of charter.

Defects of classification method

Like most compromises, the plan of classifying cities is not altogether satisfactory. Cities of the same class, even when they have approximately the same population, seldom have exactly the same local conditions and, therefore, require different governmental arrangements and corporate powers and responsibilities. Cities, also, as they grow in population, may pass from one class to another, and thus be forced to change their scheme of government and to assume new and unnecessary burdens and responsibilities.[2] Moreover, where classification is not expressly authorized or defined in the state constitution, legislatures have sometimes resorted to ingenious and minute subdivisions of classes whereby special legislation, disguised under some general phraseology, could be enacted for a single city.[3] Such practices, when sustained by court decisions—as was for a long time the case in Ohio—enable the

[1] On the operation of this system, see G. L. Schramm, "Special Legislation for New York Cities," *Amer. Polit. Sci. Rev.*, XVI, 102-107 (Feb., 1922).

[2] After the result of the census of 1920 became known, the city of Reading, Pennsylvania, was obliged to change from commission government to mayor-council government, merely because its population exceeded 100,000, which is the dividing line between cities of the second and third classes in Pennsylvania. See *Nat. Mun. Rev.*, X, 4-5 (Jan., 1921).

[3] See *Mun. Affairs*, VI, 234-244 (June, 1902).

CHAP. XLV

legislature practically to nullify the constitutional prohibition against special legislation.

4. Home-rule plan

The home-rule method of charter drafting is now authorized by the state constitution or laws in not fewer than sixteen states;[1] more than two hundred cities and villages are said to be operating under home-rule charters, including fifteen of the thirty largest cities of the country. This plan goes farther than any that have been described in emancipating cities from arbitrary legislative interference. The fundamental idea is that, inasmuch as it is the people of each city who are most interested in, and directly affected by, their municipal government and administration, they should have the right to draft their own charters and embody therein whatever plan of government they prefer, and to exercise such corporate powers as are not inconsistent with the constitution and general laws of the state. In other words, each city may make its own charter if it wishes to do so, just as each state is free to adopt its own constitution and to put therein whatever it sees fit, subject, of course, to the national constitution and laws.

There are different modes of framing home-rule charters, but in most states the method of procedure is to elect delegates to a charter convention (or freeholders' convention, as it is sometimes called), which drafts a charter and submits it for ratification, much as a constitutional convention drafts and submits a new state constitution. As a rule, the charter goes into effect when ratified by popular vote. Amendments are usually initiated by petition and ratified by the voters.

Advantages

The home-rule plan has three or four principal merits. First, it enables the people of a city to have whatever form of government they consider best adapted to their needs. In determining, too, what is best adapted they are free to experiment—a situation from which much good ought to accrue to the cities of the entire country; for every home-rule municipality is a political laboratory, or experiment station, whose results soon become known to a wide circle of communities. Second, a genuine home-rule charter plan not only gives cities greater freedom in governmental organization but confers upon them the right to perform any functions not forbidden by the constitution or general laws of the state. Thus relieved of the necessity of constantly begging the legislature for

[1] Missouri (1875), California (1879), Washington (1889), Minnesota (1896), Colorado (1902), Oregon (1906), Oklahoma and Michigan (1908), Arizona, Ohio, Nebraska, and Texas (1912), Connecticut, Florida, and Maryland (1915), Indiana (1921).

new grants of authority, each city is left practically free to undertake those new municipal enterprises which are everywhere becoming necessary for the welfare of the community. Third, municipal home-rule benefits the state legislature by relieving it of the necessity of considering a multitude of local questions which it is poorly prepared to pass upon intelligently, even if it had unlimited time. Better opportunity is thus gained for the consideration of matters of importance to the state as a whole. Finally, home-rule stimulates greater interest of citizens in their own local government. If things go wrong, they cannot lay the blame upon the legislature. Their government may be good, bad, or indifferent, but it is what it is because the majority of the voters want it so; in them alone resides the power to change conditions at any time. The home-rule plan thus serves as an important agency in bringing home to city voters their political responsibilities in local affairs.

5. Optional charter system

An optional, or alternative, charter system has come into favor recently in a few states. This plan introduces a sort of à la carte charter service by incorporating in the general law of the state several standard types of charter providing for different forms of government, including the commission form, the commission-manager plan, and sundry varieties of the mayor-council type, and permitting each city to select for itself a form of government from the varieties thus offered. A New York law of 1914 authorizing the choice of any one of seven standard types of charter was upheld as constitutional by the court of appeals in 1917. Massachusetts enacted a similar law in 1915, allowing choice among four forms; and this law is now in operation. North Carolina and Virginia also have optional charter laws. Obviously, this alternative, or optional, charter system, with its high degree of flexibility, has many real advantages; and it is hard as yet to discern any serious drawbacks to it. It is designed to avoid the disadvantages of both a uniform municipal code and the special charter system, without allowing such a degree of freedom as exists under the home-rule plan. In this last respect the system meets the objections of those opponents of municipal home-rule who feel that the freedom provided for in that system is liable to serious abuse.

Necessary limitations on municipal freedom

After all, it must be recognized that no one of the plans for relaxing legislative control makes the city entirely free. Even under the most thoroughgoing home-rule system, locally made

CHAP. XLV

charters are subject to the general state laws, and the legislature, if it cares to use its power, can encroach indefinitely upon the city's freedom. This must inevitably be so. For the city is in the state, is a part of the state, and is inextricably interlocked with the state in its interests and duties. Even if the legislature is disposed to leave the city entirely free to deal with purely local matters as it desires, there is not always a clear line of demarcation between things which are wholly local and those which, while perhaps primarily local, transcend city boundaries and concern the people of other portions of the state. In connection with elections, police, health protection, methods of taxation, and school administration, for example, the legislature can hardly be expected to make such a surrender of its powers as will prevent it from intervening to restrict municipal authority in ways which may not be locally acceptable. Nevertheless, despite its limitations, wherever the home-rule system has been fairly tried it has greatly lessened the danger of unwarranted legislative intermeddling in municipal affairs.

Administrative supervision of municipal affairs

The main object of all of these different plans of charter-framing, except the special-charter system, is to reduce to a minimum arbitrary or factious legislative interference with local autonomy. This end may, however, be partially attained in a manner quite dissociated from any method of granting or obtaining charters, namely, through administrative supervision over certain municipal activities by state officers or boards such as is secured, for example, in France through the supervision of communal affairs by the national government's principal local representative, the prefect of the department.[1] Beginnings in this direction have already been made. In New York and Massachusetts state civil service boards either exercise direct supervision over the work of local civil service commissions or have entire charge of the administration of the civil service law in all cities. Again, not a few states have placed the supervision of the enforcement of their election laws in the hands of a state official or board, in order to check local abuses, an example being the work of the New York state superintendent of elections. Similarly, state boards of health or education, state finance departments or commissions, and state public utilities or public service commissions have, in a number of states, taken over in recent years many of the functions previously performed by the state legislature. A number of states go so far as to provide for state auditing of municipal accounts, and require the adoption

[1] F. A. Ogg: *The Governments of Europe* (rev. ed.), 473-474.

of a uniform system of book-keeping in all cities and the making of regular financial reports in a specified form to the state auditor or some other state authority. Whenever, furthermore, a problem of public service transcends in scope the boundaries of several adjacent municipalities, there is a natural tendency to call in state administrative control; under these circumstances we are apt to find such metropolitan park, sewerage, or police boards as exist in Massachusetts, with authority over the metropolitan district of Boston.

Advantages and obstacles

As a rule, state administrative supervision on these lines has proved far more beneficial to the cities directly affected by it than has legislative supervision. In contrast with the amateurish capricious, and often unintelligent regulation by the legislature, administrative control affords at least the opportunity for supervision by experts possessing, or in a position to acquire, exact knowledge of the problems with which they have to deal, and capable of developing a more or less consistent and permanent policy. The possibilities of administrative supervision have, however, only fairly begun to be realized. Their development is impeded by deeply rooted devotion to the principle of local home rule. Besides, much of the state supervision which we thus far have is conducted through more or less independent and uncorrelated administrative boards or commissions whose effectiveness is not infrequently impaired by the influence of political considerations.

A state department of municipal affairs

In order to unify and harmonize administrative supervision, it has been forcefully urged [1] that in each state there should be created as a part of the general governmental system a department of municipal affairs or local government whose function it would be (1) to secure a general unified system of municipal government, subject to variations to suit the needs of different localities; (2) to secure the employment of skilled legal, financial, engineering, and medical advisors on all aspects of municipal administration; (3) to link up public health and educational activities with other vitally related functions, such as city-planning, housing, and recreational facilities; (4) to bring about the proper control of local finances and public utilities; (5) to facilitate closer coöperation between adjacent cities having common problems; and (6) to render valuable service to all the cities in the state by conducting expert investigations and giving free expert advice from a central depart-

[1] T. S. Adams, in C. S. Bird, *Town-Planning for Small Communities* (New York, 1917), 327-330.

ment. Small cities, in particular, are not in a position to employ men of high skill, and are frequently led into error and wasteful expenditure; and, although many of their local problems are alike, they generally act independently, and often in complete ignorance of the experience of other cities.[1] They would be specially helped by the central agency suggested.

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CHAPTER XLVI

THE MAYOR-COUNCIL TYPE OF CITY GOVERNMENT

No matter in which of the ways described in the preceding chapter a city obtains its charter, the scheme of government that it will have is almost certain to conform to one of three distinct types: mayor-council, commission, commission-manager. The principal features of the first type will be described in the present chapter, those of the second and third types in the chapter immediately following. The mayor-council form, which is still found in a decided majority of cities of more than thirty thousand inhabitants, is based on the time-honored doctrine of separation of powers, and its most distinguishing feature is the conspicuous and influential position assigned to the chief executive. This chief executive is the mayor, who, accordingly, will first occupy our attention.

The mayor

American mayors are uniformly elected by direct popular vote, never by the council,[1] as in Europe. Their term ranges from one year in some of the smaller cities, especially in New England, up to five years; in the largest cities, *i.e.*, New York, Chicago, Philadelphia, St. Louis, Boston, and Baltimore, it is four years, but elsewhere it is most commonly two years. Mayors generally receive some compensation for their services, varying from a mere nominal sum in small places up to $10,000 in Boston, $12,000 in Philadelphia, $15,000 in New York, and $18,000 in Chicago. In the last three cities named the mayor's salary is greater than that of the governor of the respective states.

Powers and duties

As the city's chief executive, the mayor is expected to enforce the ordinances or local laws passed by the city council and to maintain order. He represents the city in its dealings with other municipalities and upon all ceremonial occasions. He is sometimes given the right to pardon violators of municipal ordinances. He may also exercise more or less general supervision over the work of the various city departments, although in practice this function depends largely on his power to appoint and remove department

[1] Except in some commission or commission-manager cities. See Chap. XLVII.

CHAP. XLVI

heads. The tendency in charter revisions where the mayor-council type of government has been retained is to increase the mayor's power and responsibility in appointments and removals. But in the great majority of cities his appointments do not take effect until they are approved by the council. This requirement was originally designed to check a possible abuse of the appointing power by an unscrupulous mayor, but it has often facilitated the shifting of responsibility for bad appointments back and forth between the mayor and the council and has furnished the occasion for many malodorous political trades between the mayor or his friends and the political factions represented in the council. The system is fraught with more possibilities for evil than for good, and it might well be superseded by a concentration in the hands of the mayor of entire authority and responsibility for the appointment of department heads, as has come about in New York and a few other places.

Appointments

Removals

In the national government the president, as we have seen, may remove officials without any action on the part of the Senate, even though the consent of that body was necessary for the original appointment.[1] Many cities, however, not only require councilmanic confirmation of appointments but make the council's consent necessary to removals. This, of course, greatly reduces the effectiveness of the mayor's removing power, correspondingly diminishes his responsibility for the proper conduct of the city administration, and is sometimes a serious obstacle to the introduction of needed reforms. The tendency in recent charters has been to discard this feature along with councilmanic confirmation of appointments. Where the power of removal resides in the mayor alone, he is in a position not only to supervise but to control all departments of the city government.

Budget-making

Closely related to the mayor's power over the administrative departments is the part which he frequently, although not in a majority of cities, plays in the preparation of the annual budget or financial program. This work used to be an exclusive function of the council, and in most cities it is still performed by a committee of that body. None the less, in an increasing number of cities the budget is drawn up by the mayor alone. Where this system prevails, as in Boston, no proposal to spend the city's money can legally be considered by the council unless it emanates from the mayor; all that the council can do is to reduce or strike out recom-

[1] See p. 259.

mended appropriations. In New York City the budget is prepared by the board of estimate and apportionment, of which the mayor is a member and in which he is given three votes. In many other places a tendency is manifest to allow the mayor a larger share in allocating city revenues.

Furthermore, the mayor presides in council meetings in cities of Illinois and of some other states; and everywhere he is given a direct share in the enactment of such local legislation as is authorized by the city charter. He transmits to the council messages and recommendations, together with the reports of various city officials, and in all cities of the type now under consideration he may prevent or delay the enactment of ordinances, including the granting of franchises, by the use of the veto power, although his veto may usually be overridden by a two-thirds or three-fourths vote. Where the veto extends to separate items in appropriation bills, the mayor is in a position to prevent or check waste and extravagance, if he will, in the use of the city's funds. Although much more frequently exercised than the veto of the governor or the president, the mayor's veto has not contributed greatly to the efficiency of our city governments.

The council: decreased importance

In marked contrast, but contemporaneous, with the rise of the mayoralty in American cities has been the decline of the law-making branch, commonly known as the council or board of aldermen; and it is interesting to observe in passing that these two tendencies in municipal affairs, the exaltation of the chief executive and the decline in popular confidence and esteem of the legislative branch, almost exactly synchronize with similar tendencies in the state and national governments. Why the council, which completely overshadowed the mayor and dominated the entire city administration before 1850 and still exercises important legislative powers, should to-day almost everywhere enjoy only a modicum of popular respect, is partly explained by the decline in the caliber of councilmen which set in about the middle of the nineteenth century when our cities were growing with unprecedented rapidity. With this growth came a corresponding expansion in the variety of municipal activities. At first, the administration of these services fell to committees of the council. But their incompetence led state legislatures very generally to strip the council of most of its administrative responsibilities and transfer them to independently chosen heads of departments, to popularly elected boards, even to state commissions, or else to entrust them to the mayor. Thus shorn of

CHAP. XLVI

most of its former administrative functions, the council now finds its legitimate activity almost wholly restricted to the sphere of municipal legislation—a sphere which in the average city is not sufficiently broad to challenge the interest and activity of men of first-rate ability; while in the largest cities, where the opportunities for distinction in the field of local legislation are more abundant and varied, adverse political conditions usually serve to deter men of more than fair ability from entering upon service in the council. Another partial explanation of the council's decline is to be found in the common practice of electing councilmen from small districts or wards, instead of on a general ticket for the entire city.[1] The general ticket system is not without serious disadvantages, especially in our largest cities, but it could hardly prove less productive of high-grade councilmen than the ward system. Then, too, the matter of compensation, or the lack of it, enters into the explanation. Many cities either pay their councilmen nothing or allow them only nominal sums for which properly qualified men cannot afford to make the sacrifices which service in the council entails. Few facts connected with the mayor-council type of government are more to be regretted than that the council, with all its potentialities for good, should have so degenerated in many cities as to become a byword among the best citizens. It is truly "the lowest rung in the ladder of American public life," and, unfortunately, few of its members ever manage to rise above it; whereas, it ought to be at once the starting-point and the incentive for long, useful, and conspicuous political careers.

Structure of the council

There is no uniformity of size among city councils; seldom, indeed, outside of Illinois,[2] does the size of the council bear any definite relation to the size of the city. New York has a board of aldermen of seventy-three members;[3] Chicago has a council of seventy members, although the number is soon to be reduced to fifty; and the number elsewhere runs downward all the way to nine, even in such large cities as Boston and Pittsburgh.[4] Some councils, fur-

[1] In the 99 cities of over 30,000 population in 1916 which had a single-chambered council, 46 elected councilmen by wards, 11 at large, and 42 by a combination of the two methods.

[2] In this state the number of council members is graduated by law according to population.

[3] The New York board of aldermen consists of the president of the board elected by the voters of the city at large, the five borough presidents (one elected in each borough), and sixty-seven aldermen elected from single-member districts.

[4] Most commission-governed cities have councils, or commissions, of five members.

thermore, are organized on a unicameral, and others on a bicameral, basis. The single-chambered council is found in the majority of cities, especially those with a population of less than thirty thousand; of the hundred and twenty-four cities of this description in 1916, only fifty had a bicameral council. Many cities that once followed the bicameral plan long since abandoned it, the latest large ones to do so being St. Louis and Philadelphia. To-day, Baltimore is the only one of the ten largest cities in the country that retains the bicameral form. No city that has once discarded it has ever gone back to it, for it has few, if any, advantages which are not more than offset by the delays incidental to it, by the friction which frequently arises between the two chambers, and by the increased opportunities for chicanery and corruption.

Legislative, or ordinance, power

The primary function of the council is to give formal expression to the legislative will of the city through the enactment of local laws called ordinances. The scope of this ordinance power is always set forth in more or less detail in the city charter or municipal code; and no exercise thereof is valid which is not clearly authorized by some provision of the charter, or which is inconsistent with any state statute or any provision of the state or national constitution. City ordinances fall into two main classes. The first are called contractual ordinances, because they grant special favors, privileges, or franchises, which, if accepted by the grantee, set up a contractual relation between the city and certain private persons or corporations—a relation that can legally be changed only with the consent of both parties. In this class are included franchise grants to railroads, warehouse companies, street railways, express, telephone, and telegraph companies, electric lighting, gas, and central-heating companies, and sometimes also to water-supply companies.

The second class comprises purely legislative ordinances; and of these there are several different kinds: (1) ordinances relating to the organization of the city government, filling in the details which the charter leaves to be supplied; (2) ordinances relating to financial matters, such as those imposing taxes and license fees for certain occupations, authorizing loans, and making appropriations for municipal purposes; (3) ordinances initiating public improvements (often involving the exercise of the right of eminent domain), such as street-openings, widening and paving streets, laying a sewerage system, the erection of public buildings, the laying out of parks and playgrounds, and the installation of a water-

CHAP. XLVI

supply; (4) ordinances regulating the use and lighting of streets and public places; (5) ordinances regulating the construction of buildings and billboards, usually called the building code; (6) ordinances constituting the sanitary code, including regulations for the disposal of all forms of waste, street and alley cleaning, drainage and plumbing requirements, milk distribution and food inspection, and quarantining infectious and contagious diseases; (7) ordinances protecting the public safety and morals by restricting the sale of liquor, fire-arms, and fireworks, censoring moving-picture exhibitions, and suppressing gambling and vice; (9) ordinances regulating public utility corporations by fixing rates, prescribing equipment, and regulating service. Unlike contractual ordinances, legislative ordinances are subject to modification or repeal by the council at any time.

Limitations on the ordinance power

It should be borne in mind that city councils rarely or never have a perfectly free hand in dealing with subjects which clearly fall within the range of the ordinance power. All ordinances, for example, must be reasonable (although they are presumed to be so until the contrary is established in legal proceedings before some court); ordinances must not make special or unwarranted discriminations in granting privileges or imposing restrictions; they must not unduly restrain or interfere with trade; no ordinance is valid if in conflict with any provision of the state constitution, or with any statute, or with the national constitution or laws; and all must be enacted in due compliance with the formalities prescribed in the charter. Furthermore, the legislative authority of a city is not vested exclusively in the council. Certain administrative bodies, such as the board of health, or the fire department—even single officers—are often empowered to prescribe rules within their respective fields of jurisdiction. Such rules are called regulations in order to distinguish them from ordinances. But they are generally of the same legal force as ordinances; they are subject to the same restrictions, and are no less binding upon all citizens.

Importance of administrative activities

Although absorbing much space in the average municipal charter and bulking large in the public eye, the legislative function of city government is much less important than the work of the administrative departments. It is the departments that manage the multiform and sometimes highly technical public services rendered by the modern municipality and carry on the daily routine of municipal business. It is they that attend, for example, to the col-

lection and disbursement of the city revenues, the negotiation and retirement of city loans, the organization, training, and daily work of the members of the police force and the fire department, the construction and engineering operations of the department of public works, the enforcement of health, building, and fire regulations; and they perform a multitude of other activities which affect, more or less directly, the safety, comfort, and general well-being of every citizen. This administrative work is often given scant publicity in the newspapers, and the average city dweller knows little about it. As has been implied, relatively little attention has been given it in the older city charters. Nevertheless, in order to control this branch of city government political machines and special interests often resort to desperate and corrupt methods; they, at least, are fully aware of its political and pecuniary possibilities.

The departments

In the organization, number, and titles of administrative departments, as in so many other respects, there is the greatest lack of uniformity. In most commission-governed cities there are five departments into which are compressed, and sometimes cramped, all the varied municipal activities; but from this the number runs up to twenty-five in Chicago and thirty in Boston. Like the size of the council, the number of departments bears little or no relation to the size of the city. In places, however, of moderate population—say from thirty thousand to one hundred thousand—one is almost certain to find at least six distinct departments. There is (1) a law department, headed by the corporation counsel or city attorney, and charged with the duty of giving legal advice to the mayor, council, and all city departments, prosecuting or defending all suits brought by or against the city, drawing up or approving all city contracts, and drafting municipal ordinances; (2) a department of finance, which is likely to include the offices of city treasurer, city comptroller, auditor, and tax assessors or collectors; (3) a department of public safety, including the machinery of fire, police, health, and building administration; (4) a department of public works, which is usually the largest department, with subdivisions or bureaus attending to the care of the streets, public buildings, parks and playgrounds, sewerage and water systems, and practically all the engineering work of the city; (5) a health department, charged with the enforcement of the provisions of the sanitary code; and (6) a department of education—although in not a few cities, notably in Illinois, the administration of school and

CHAP. XLVI

library affairs is not strictly a municipal function but rather one which is handled by more or less independent school or library boards.

Departmental organization

In early times, and well down toward the Civil War, the various administrative departments or services were presided over by committees of the council; and this is the system which still exists and gives general satisfaction in English boroughs. In this country, however, the plan, as we have seen,[1] broke down and in its place emerged another distinctive feature of American municipal government, namely, administrative departments legally independent of the council, and presided over by persons who are seldom chosen by the council and are never members of that body. At the head of departments in which promptness of decision, the maintenance of discipline, and capacity for vigorous action are the qualities most needed, *e.g.*, the police and fire departments, one finds, ordinarily a single commissioner. On the other hand, those activities which entail discussion, deliberation, and decision of matters in which different racial, religious, or other local factors are involved, *e.g.*, school and library administration and welfare and recreational work, are usually in charge of a board or commission. No city finds it wise or expedient to adhere to either of these arrangements to the entire exclusion of the other; each type of organization has its strong points and its limitations.

Modes of selecting department heads

In the selection of department heads different methods are employed, and in few cities is any one method followed exclusively. Popular election, as in the case of the comptroller in New York, Philadelphia, and other cities, is probably the least satisfactory of all. Election of some heads by the council prevails in many cities. Appointment by state authorities is comparatively rare, and in theory is hardly less satisfactory than popular election; although in Boston, St. Louis, and Baltimore, where the head of the police department is selected in this way, a better type of official has been secured than formerly through local action. School or park boards are in some cities, notably Philadelphia and Pittsburgh, appointed by the judges of the local courts, a method which has little to commend it. A few cities, of which New York and San Francisco are the most conspicuous examples, have given the appointing power to the mayor without requiring councilior, or other, confirmation. In Boston the mayor designates department heads, but their appointments do not become effective unless within thirty days the

[1] See p. 757.

state civil service commission indicates its formal approval of the persons selected. In the great majority of cities, the mayor appoints most of the department heads, but his appointments are subject to the approval of the council. Finally, because of the unfortunate part which political considerations have played in the choice of department heads, with consequent impairment of administrative efficiency, some civil service reformers have advocated selection by competitive examinations, otherwise known as the merit system. As yet, however, no city has applied this method to any considerable extent in the selection of department heads. Whether it is suited to the filling of such positions is a debatable question. For the selection of subordinates, however, including the bureau chiefs and the great mass of clerical and technical employees, and even laborers, competitive examinations are widely used; and there can be no doubt that they yield results far superior to the old spoils system in which administrative efficiency and the city's welfare were considerations entirely secondary to political influence and rewards.

Dissatisfaction with the so-called "federal type" of city government

The mayor-council form of government is sometimes referred to as the federal type of city government, because, first appearing in Baltimore in 1796 and in Detroit about ten years later, and hence soon after the adoption of the federal constitution, it embodies a number of points which bear striking resemblance to some of the most conspicuous features of the organization of the national government. The evidence, however, of direct "influence of the federal analogy," as it has been called, is not altogether convincing, in view of the fact that there is almost, if not quite, as much similarity between the mayor-council type and the constitutional arrangements of the several states; so that it is difficult to determine whether the national government or the state governments exerted the greater influence.[1] In any event, upwards of a thousand cities in the United States have become convinced during the past twenty years that, however well-suited to the needs of the national government and to the state governments, checks and balances, divided responsibility and authority, and bicameral legislatures were responsible for much of the inefficiency which characterized the average American city in the nineteenth century and, in general, serve no useful purpose in modern city government. The forms

[1] On the "influence of the federal analogy," compare W. B. Munro, *Government of American Cities*, 6-9, and H. L. McBain, "Evolution of Types of City Government in the United States," *Nat. Mun. Rev.*, VI, 19-30 (Jan., 1917).

CHAP. XLVI

of organization which have rapidly displaced the mayor-council type in this period will be described in the following chapter.

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CHAPTER XLVII

COMMISSION AND MANAGER GOVERNMENT

Defects of mayor-council government:

The fundamental defect of the mayor-council type of city government is the division of authority and consequent scattering of responsibility. Legislative authority, for example, is divided between the council and the mayor, and each may, with some show of right, claim that the ultimate responsibility rests with the other. In administration, likewise, authority is diffused and responsibility scattered. Administrative functions are placed in the hands of a group of officials separate and distinct from the legislative body, and formal contacts between the two arise only when the council is called upon to confirm the appointment of department heads by the mayor, to vote the annual appropriations for the work of the departments, and to pass ordinances creating, reorganizing, or abolishing departments. Because of their joint participation (usually) in the selection of department heads, the mayor and council divide responsibility for the efficiency or lack of efficiency in the city's administrative services. As the legislative body, the council has no legal right to meddle with the details of city administration. In practice, however, few city activities are found to be outside the sphere of councilmanic influence. Over and over it has been proved that the body which provides the money to carry on departmental activities will in one way or another have something to say concerning the expenditure of its appropriations.

1. Fundamental

2. Incidental

The foregoing defects seem to be inherent in, if not inseparable from, the system of checks and balances, "another name for which is friction, confusion, and irresponsibility." But there are certain other shortcomings which, although not fundamental and inherent, are almost universally associated with the mayor-council form. In the first place, the council is usually a much larger body than is necessary in order to represent the various elements in the city and to transact the city's legislative business satisfactorily. Where the bicameral plan persists, the division of authority and responsibility is carried still farther, and the ordinary citizen is usually completely in the dark as to who is to blame for what passes the council

CHAP. XLVII

or is smothered in committee. In almost every mayor-council city there is, too, an unnecessarily large number of elective officers who have purely routine functions, all or practically all minutely prescribed by state law or city ordinance. Besides dividing responsibility for the city administration, the popular election of such non-policy-determining officers lengthens the ballot, confuses the voter, and serves no purpose except to enable political machines more easily to secure and retain control of the city government. To these defects must be added the evils arising from the almost universal ward system of electing members of the council, from their nomination and election by a cumbersome and expensive partisan primary and election system, from the absence of any method of quickly removing unsatisfactory officials from office, from the inability of the people to secure needed ordinances if the council fails to enact them, and from the absence of any popular veto upon legislative acts of the mayor and council which may be opposed to the best interests of the community.

Reformed mayor-council government

Not a few cities, attributing the unsatisfactory character of their government merely or mainly to these incidental defects, have simply lopped off one or more of them or, more rarely, have attempted to graft upon the old stock some of the newer political devices. Thus many cities have reduced the size of the council and the number of elective officials, or abolished the bicameral council, or replaced the ward system with election at large, or discontinued partisan primaries and substituted either nomination by petition or non-partisan primaries and elections, or concentrated the appointing power in the mayor, or authorized the popular referendum in the case of all franchise ordinances, or even provided for the popular initiative and referendum in connection with other ordinances. Such piecemeal reforms have produced some good results. But they do not go to the root of some of the most serious municipal ills.

Commission government

Recognizing this fact, more than five hundred cities have openly repudiated the old doctrine of separation of powers, with its checks and balances, divided authority, and diffused and diluted responsibility, and have substituted therefor either the commission or the manager form of government. The first step in this direction was taken by Galveston in 1900. Progress was slow for a few years, but after Des Moines reconstructed its government on the commission basis in 1907 the plan spread rapidly, especially among the smaller cities of the country, although it has also been adopted

in almost a hundred cities of more than 30,000 inhabitants, including half a dozen with populations in excess of 200,000, namely, Buffalo, New Orleans, Jersey City, Newark, St. Paul, and Portland, Oregon. Commission government is now authorized by law in all but four states—New Hampshire, Vermont, Rhode Island, and Delaware.

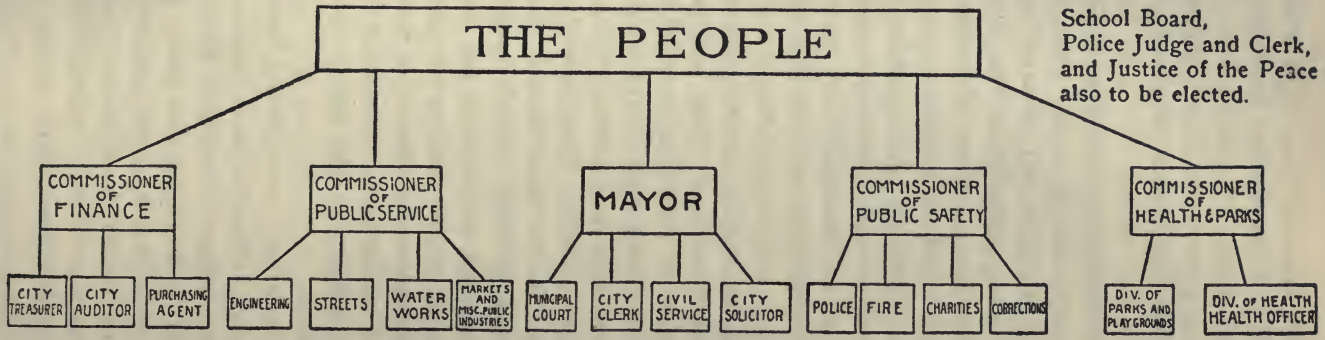
Essential features

Commission government involves greatly simplified machinery. In place of a bicameral council, or the large and unwieldy single chamber, in place of a mayor and a council each having some of the powers which belong primarily to the other and each serving as a check upon the other, in place of theoretically separate and independent legislative and administrative departments, one finds a small commission, consisting usually of five members elected by popular vote and made conspicuous by the smallness of their number and the abolition of practically all other elective municipal offices. In this commission are concentrated all the legislative and all the administrative authority of the city government. As the legislative body, the commission has the ordinance power enjoyed by the council in mayor-council cities, including the right to fix the tax rate and pass the annual appropriation bills. As an administrative body, it exercises all of the administrative authority which in mayor-council cities is shared by the mayor, administrative departments, and council. Each member is assigned to serve as the head of one of the five departments into which the administrative work is usually divided; and the commission appoints the subordinate officials unless the selection has been left to individual commissioners or to a special civil service commission. In brief, the essence of commission government is the complete fusion of both legislative and administrative duties, and a consequent centralization of responsibility in the hands of a very small group of conspicuous officials.

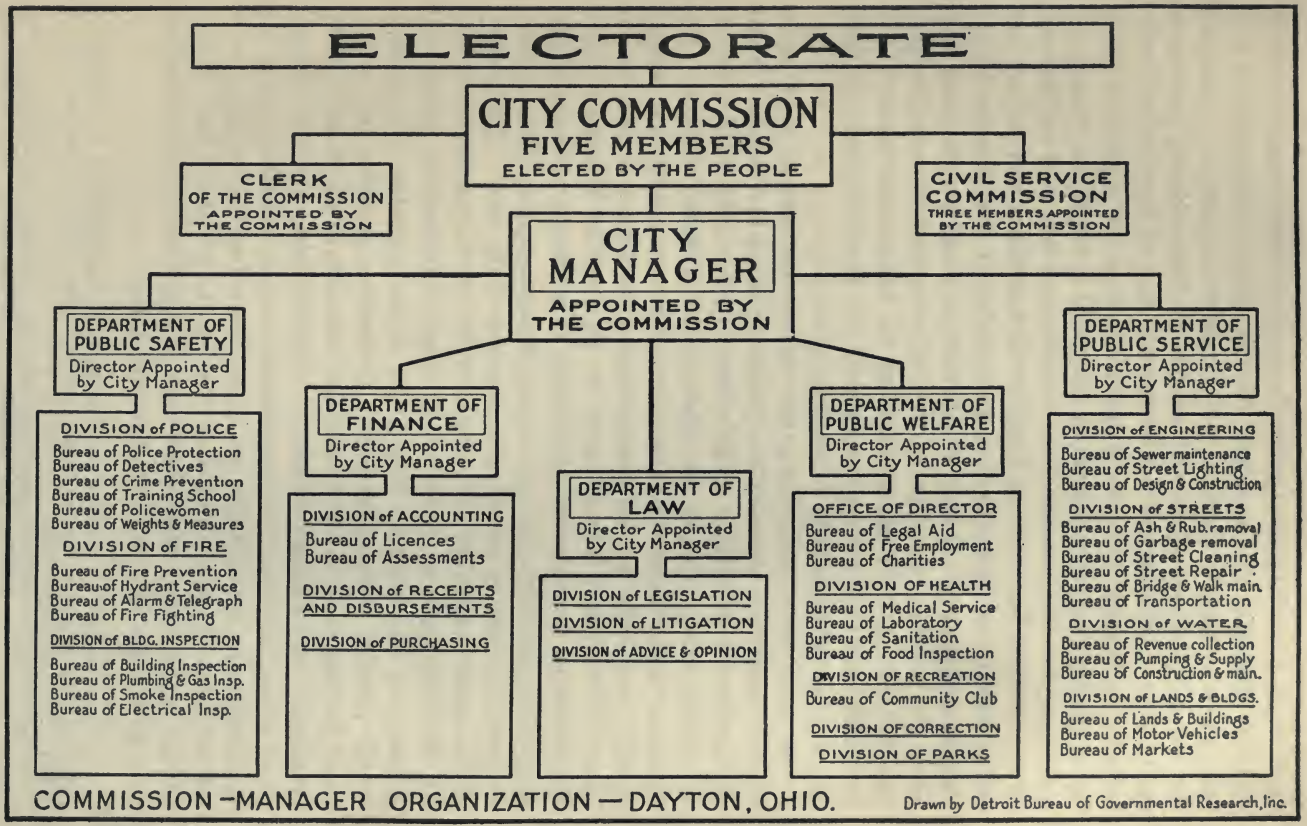
Incidental features

The foregoing constitute the *essential* features of the commission system. But, in addition to them, certain non-essential or incidental features are almost invariably found and contribute in no small measure to the success of the plan. For example, almost everywhere the ward system has been abolished and the members of the commission are elected from the entire city, an arrangement which helps to make the office of commissioner more conspicuous and attractive. Moreover, candidates for the commission are generally nominated either by petition or by non-partisan primary, and are voted for on election day by means of a non-partisan bal-

DES MOINES PLAN OF COMMISSION GOVERNMENT, APPLIED TO DAYTON



Courtesy of Dr. L. D. Upson



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CHAP. XLVII

lot. With such extensive powers vested in a small group, it is wise for the public to retain means of direct and prompt control over the commissioners. To this end provision is made in practically all commission-governed cities outside of Pennsylvania for the recall of an unsatisfactory commissioner, and of any other elective officers, by means of a special election before the expiration of the term of office. Another common safeguard is the initiative and referendum, for use in connection with the enactment of ordinances.[1] Each of these features has contributed something to the improved civic conditions which have usually followed the adoption of the commission system. It should, however, be clearly understood that, with the possible exception of the initiative and referendum, they are neither essential nor peculiar to the commission form of government, and that any mayor-council city can have them, as some do, without adopting the commission plan.

Variations in practice

In their laws authorizing the commission system most states have followed the so-called Des Moines plan rather closely. There is, however, naturally, a great amount of variation of detail, and some differences appear in relatively important features. For example, the term for which members of the commission are elected, though commonly two or four years, varies from one year in the case of Gloucester, Massachusetts, to six years in Wisconsin cities. Furthermore, in some cities the terms of all members expire at the same time, although the more usual arrangement is for three members to be chosen at one election and two at the next. The method of assigning administrative departments to the various members of the commission also varies. In South Carolina the assignment is made by the mayor. Most cities follow the Des Moines plan, which permits the commissioners themselves to make the assignment by a majority vote. Under the charter laws of Massachusetts, Arkansas, and Louisiana, and in a considerable number of scattered cities, however, each candidate for the commission has his name placed on the ballot as a candidate for the headship of a particular department and is elected by the people to take charge of that department. Much difference of opinion exists as to whether this or the Des Moines method is preferable.[2]

[1] A large amount of information relating to the operation of the initiative, referendum, and recall in commission-governed cities will be found in *Equity*, XVIII, 162-311 (Oct., 1916).

[2] Under the Des Moines plan there are the following departments: (1) public affairs, (2) accounts and finance, (3) public safety, (4) streets and

In almost all cases a mayor is still provided for. As a rule, he is elected directly to the office by popular vote, although in a few cities the commissioner who receives the highest popular vote automatically becomes mayor, and in New Jersey and Nebraska the commissioners select one of their own number. In any event, far from being the "too conspicuous and overburdened mayor" found in so many cities, he is little more than the first among equals. He wields no veto power; as mayor, he usually has no appointing power; he has no independent power of removal; he is the nominal head of the city government and acts as such on ceremonial occasions, but of actual authority he has little or no more than each of his colleagues.

The mayor under the commission form

The commission plan has much to commend it. After once trying it, only about a dozen cities have gone back to the mayor-council form. It is, however, not satisfactory in all respects. In the first place, there is often haziness as to the place which the commission is actually to fill in the conduct of the city's affairs. The differences of opinion, already alluded to, upon the proper method of assigning commissioners to departments arise largely from the failure of the makers of commission-government laws to discern and clearly state the true functions of the commission in relation to the administrative work of the city. If it is clearly understood that the commission's function is to serve as a general supervisory body, each member simply overseeing in a general way the administration of the particular department to which he has been assigned, but leaving the detailed conduct of departmental affairs to permanently appointed and professional administrators, the assignment of departments can properly be left to the commission. If, on the other hand, it is assumed that each commissioner will devote most of his time to the business of his department, becoming its active superintendent and director, the case for election to specific offices becomes much stronger.

Defects of the commission system

Perhaps the most serious defect in commission government lies in the fact that it does not carry the concentration of authority and responsibility to its logical conclusion, but leaves them divided among the five persons who usually compose the commission. A five-headed administrative system, even supposing each head to be

public improvements, and (5) parks and public property. See L. J. Johnson, "Commission Government for Cities: Election to Specific Offices *v.* Election at Random," *Nat. Mun. Rev.*, II, 661-663 (Oct., 1913).

CHAP. XLVII

a real expert, makes the highest efficiency difficult, if not impossible, of attainment. Friction is certain to arise sooner or later, and from one cause if not from another. A single commissioner, for example, may stubbornly adhere to a policy of his own which is disapproved by his colleagues; or he may find himself forced by them to adopt a policy to which he is strongly opposed. What is lacking in all cities governed by the simple commission—and this is an inherent defect of the system—is an apex to the administration which will insure leadership, teamwork, and a proper degree of subordination, qualities which are as essential to efficient administration as is individual expertness.

Another important, though incidental, defect of commission-government laws or charters is their stress, as a rule, upon the political, rather than the administrative, side of city government. Sections relating to nominations, primaries, forms of ballot, number and function of commissioners, and the initiative, referendum, and recall are apt to be very ample, while comparatively scant attention is given to administrative provisions which would be of the greatest help in bringing the business methods of the city up to the level of those of the best private business corporations. One seldom finds, for example, adequate provision for scientific budget-making, for modern methods of accounting and reporting, for centralized purchasing, or for numerous other important business details. The seriousness of these omissions appears when one remembers that most of the commission's work relates to matters of routine business, differing slightly, if at all, from the ordinary operations of any large business concern. In fact, the modern city is essentially a great business enterprise, combining, for example, the work of a construction company, of a purveyor of water, sewerage facilities, and fire protection, of an accounting and auditing corporation, and of the people's agent in dealing with public service corporations. For the proper and efficient handling of such business activities, commission government can no more spontaneously generate scientific business methods than can mayor-council government.

Counter-balancing merits

In view of these shortcomings, one may well be surprised at the degree of success which the commission system has attained in most places where it has been tried. The explanation is to be found in certain very obvious merits which have repeatedly neutralized the system's inherent weaknesses. There is a marked simplification of governmental machinery in comparison with what is usually

found in mayor-council cities; expeditious handling of city business is facilitated; the introduction of more business-like methods is encouraged, even though not insured; the conspicuous position of, and large authority vested in, the commission have served in some instances to attract into the city's service men of higher caliber than were found in the old type of city council; the fusion of the taxing and appropriation powers in the same small group tends to produce greater care and circumspection in making appropriations and to prevent departments from exceeding them. To these general advantages might be added a long list of benefits which have appeared here and there in individual cities and under peculiar conditions. As a rule, an awakening of civic interest has accompanied the adoption of commission government and has contributed incalculably to its success. Indeed, it is often hard to apportion the credit for improved municipal conditions under the commission system, so much has been due to the awakening of civic consciousness and popular interest in city affairs as well as to the improved governmental machinery; the latter alone cannot regenerate any city.

The commission-manager system

With a view to remedying the defects of the commission system, without sacrificing any of its main advantages, a modified form has been introduced under the designation of the commission-manager, —or simply the manager—system. The first large city to experiment with the new type was Dayton, Ohio, in 1913. The plan worked very well there and was soon taken up elsewhere. In nine years it has been adopted by more than two hundred cities, including twelve having a population of between fifty thousand and one hundred thousand and six whose population exceeds the latter figure.[1] The manager-plan is now (1922) authorized by law in at least twenty-seven states.

Under this scheme the small, popularly elected commission is retained, with all of the powers of the commission in an ordinary commission-governed city except in the domain of administration. It enacts the ordinances and regulations for the government of the city, levies taxes, votes appropriations, creates or abolishes departments, and investigates the financial transactions or the official acts of any officer or department. It serves, however, only as the leg-

[1] Grand Rapids, Akron, Cleveland, Dayton, Nashville, and Norfolk. The largest city under manager government was Akron (pop. 208,435) until 1921, when Cleveland (pop. 796,841) adopted the plan. For a complete list of manager-cities, corrected to May 25, 1921, see *Nat. Mun. Rev.*, X, 340-342 (June, 1921).

CHAP. XLVII

islative, policy-determining, and general supervisory body of the city; and its members, devoting only a portion of their time to the city's affairs, are paid but a nominal sum for their services. Responsibility for the details of administration, which in commission-governed cities is shared by the commissioners, is imposed upon a single official, the manager, who is chosen by the commission and is directly and wholly responsible to that body. Thus in place of a five-headed administrative system, administration is centralized in one official. At the same time the system makes possible a greater degree of flexibility in the administrative organization. There is, for example, no need of compressing city activities into five or any other arbitrary number of departments merely to satisfy the requirement that there shall be only as many departments as there are commissioners.

Selection of the manager

Under this system, notwithstanding the ultimate lodgment of power and responsibility in the commission, the central figure in the city government is very clearly the manager; and to the end that the commission may secure the best manager available, choice is not restricted to a resident of the city.[1] Most, if not all, of the city managers now in office in the larger cities began in comparatively small places in other states. Local politicians can be counted on to oppose this feature. But most citizens can appreciate the advantage of having a manager who has not been identified with any local political faction or organization. The commission ought also to be left free, and usually is, to fix the manager's salary; otherwise the city may be prevented from obtaining a properly qualified person merely because of some charter provision regulating the amount of compensation. The manager is generally appointed for an indefinite term, and is therefore subject to removal by the commission at any time when he ceases to give satisfaction.[2]

The manager's functions

The powers and duties of the manager make him easily the most influential official in the city government; although his responsibility to the commission is always perfectly clear and absolutely direct, and the members of the commission are, in turn, subject to popular control through the initiative, referendum, and recall. The entire city administration revolves about the manager,

[1] There are a few exceptions, *e.g.*, Phoenix, Arizona.

[2] In practice, a prospective manager will doubtless insist upon the commission executing a contract to employ him at a fixed salary for a definite period. But such an arrangement can be terminated by the commission at any time, subject to an adjustment with the manager concerning the unpaid balance of the stipulated salary.

who, like the centurion in the Bible, saith "to this man go and he goeth, and to another, come and he cometh." He appoints all heads of departments, and sometimes the deputy heads; he assigns to each his functions; and he may suspend or remove heads or subordinates at any time for cause. Minor employees are usually selected under a system of competitive examinations administered by a civil service commission of three members appointed by the commission. But the manager has general supervision over all of the work done in the various departments and is held responsible for results. In fact, the greater part of his time is occupied with attending to the details of city administration.

Next in importance, and closely related to these tasks, is the duty of keeping the commission informed on the city's financial condition, preparing the annual budget, and going over and explaining the significance of various items. Responsibility for the enactment of the budget rests, however, not with the manager, but with the commission representing the body of taxpayers. Finally, the manager is made the chief executive of the city for the enforcement of all municipal ordinances and of such state laws as the city is expected to administer. There is still a mayor, to be sure, who is usually the commissioner receiving the greatest number of popular votes; but he has even less power than in ordinary commission cities, and in reality is little more than a figurehead.

The manager has a right to be present at all meetings of the commission, to take an active part in its deliberations, and to make recommendations to it, though he has no vote. Thus legislation and administration, the money-raising and the money-spending branches of the government, are brought into close and open relationship one with another. Members of the commission are expected to refrain from meddling in roundabout ways with administrative activities and from attempting to influence the manager in the selection of department heads and subordinates and in awarding city contracts. It must, however, be understood that manager government contains no automatic check upon this sort of thing. Nothing but the establishment of sound traditions as to the proper sphere of activity of the commission, backed by a vigilant interest on the part of the ordinary citizens, can prevent a recurrence of undesirable legislative dabbling in administrative business.

Results

The commission-manager form of government is closely modelled upon the organization of large business corporations, with the

electorate corresponding to the stockholders, the commission corresponding to the board of directors, chosen by the stockholders and charged with general responsibility for the conduct of the business, and the city manager corresponding to the president or general manager, chosen by the board of directors, responsible to them, and charged with looking after all the details of the business. The results achieved appear to have been more uniformly satisfactory than in commission-governed cities: expert administrators have very commonly been secured as managers; there has been a decided improvement in general administrative efficiency; modern business methods have been introduced; financial methods, in particular, have been noticeably toned up; and last, but by no means least, politics has thus far been largely eliminated from city administration. How long this last condition will continue no one dares predict. Credit, furthermore, for these beneficial results, as in the case of commission-governed cities, has to be divided between the improved governmental organization itself and an active and continuous interest in municipal affairs on the part of a greater proportion of citizens.

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CHAPTER XLVIII

PROTECTIVE ACTIVITIES OF THE CITY

In preceding chapters city government has been described with respect to its form or structure. We now turn to municipal functions and activities. Speaking broadly, these are the same, whatever the structure of the governmental system. And yet organization and function are intimately related. For, after all, machinery is only a means to an end, namely, the proper performance, not only of the more obvious and primary functions of all governments—the protection of life and property—but also of all those varied business and social-welfare activities which vitally affect the daily life of citizens. Indeed, the greater part of the work of city government consists in serving as an agency for the satisfaction of a great variety of daily human wants which can be better met through public than through private means.

Municipal functions classified

When entire volumes have been written on single phases of city activities, a brief chapter or two can, of course, give only the barest outline of the subject. No very satisfactory classification is possible, because many activities fall partly in one field and partly in another. But for convenience the city's organized efforts may be divided into five main groups, according as they relate to (1) protection of life and property, (2) public works, (3) social welfare, (4) education, and (5) finance. In the present chapter we shall speak only of those activities which are comprised in the first of these classes; which means to confine attention to three great protective agencies, the police, fire, and health departments.

Police department

Municipal police forces vary in size from twenty or thirty patrolmen in cities of from ten to thirty thousand up to small armies of almost 2,000 in Boston and Detroit, 4,600 in Philadelphia, 5,500 in Chicago, and almost 12,000 in New York. Although legally officers of the state, and largely occupied with the enforcement of state laws, the police are practically everywhere organized, appointed, paid, and controlled by municipal authorities.[1] At the

Organization

[1] In Boston, St. Louis, and Baltimore the organization and control of the police force has for a good many years been vested in a single commissioner

CHAP. XLVIII

head of the police department one usually finds a single commissioner, called the police commissioner or the superintendent of police, who may be either a layman with little or no knowledge of police affairs when he assumes office or a professional member of the force who has risen from the ranks. Sometimes, however, police administration is placed in the hands of a small appointive bipartisan board, especially in the smaller cities. This is about as unsatisfactory an arrangement as can be devised, since it divides responsibility, prevents prompt and energetic action, weakens discipline, and furnishes an opportunity for the entrance of all sorts of back-door influences.

Below the chief or head of the department are deputy chiefs in the larger cities, captains, lieutenants, sergeants, and patrolmen. The last constitute the great majority, and the backbone, of the force. Upon their efficiency largely depends the character of the entire police administration of the city. The force, thus organized along military lines, is apportioned to the various precincts of the city, in each of which there is a station-house serving as police headquarters. Policewomen are now also to be found in probably not far from fifty cities, including Chicago, Los Angeles, and Detroit. To them are assigned special duties connected with the supervision of dance halls, rest rooms in department stores and other public places, railway stations, and moving-picture theaters. Police matrons are also now commonly found at police stations to care for women offenders.

Specialization of functions

In every large city the police department has numerous functions to perform, and this has led to the organization of specialized squads. First and most important of police duties is patroling the streets, day and night, for the prevention of crime. For this work not less than eighty per cent of the entire force ought to be available during any twenty-four-hour period. When a crime has been committed, and the perpetrator is unknown, a second police function comes into play, namely, the discovery and arrest of the criminal, and the collection of evidence relating to the offense. In a large city this falls to detectives or plain-clothes men. Detective work may be assigned to a few regular patrolmen or sergeants in each police precinct; or it may be centralized in one office, called the detective bureau, and handled by men who devote their entire

or a board appointed by the governor. Police affairs have likewise been administered by state boards at one time or another in other cities, notably New York and Chicago. But the system is usually resented as a violation of the principle of home rule.

time to it. In large cities, too, one finds a mounted squad and a motorcycle squad to assist patrolmen in handling street traffic and exceptional throngs of people. Sometimes there is also a harbor squad to patrol the waterfront in small boats. The department regularly has to look after the telephone patrol-boxes, and the flashlight and ambulance systems which are essential in large cities; and it also sometimes has the care of the city jail, the granting of certain licenses, the listing of voters, and the enforcement of regulations issued by the health and fire departments.

Selection and training of policemen

Appointments to the police force used to be distributed by the successful political faction as rewards for the political services of ward leaders and other local politicians, in accordance with the well-known standards of the spoils system. Now, however, in most large cities, and happily in not a few smaller ones, this practice has been largely supplanted by a system of competitive examinations. Where honestly administered, the merit plan has tended to reduce political favoritism and to improve the general character and efficiency of the service. Recognizing the need for special training for the proper performance of police duties in a large city, New York, Chicago, and a score of other municipalities, following the example of London, Vienna, and Paris, have organized training schools for newly appointed police recruits.[1] The problems of police promotion and discipline, however, have not as yet found any very satisfactory solution.

In no branch of city administration are there greater opportunities for corrupt influences to make themselves felt than in the police force of a large city. It is therefore something more than a mere coincidence that in practically every startling revelation of political corruption connected with city government the police force has been more or less deeply involved. "All the lawless elements of the city which derive profit from their respective trades are willing to share their ill-gotten gains with the police in return for protection" or immunity from prosecution. The opportunities for corruption are specially great when the police are expected to enforce laws which do not reflect the sentiment or moral standards of the community, as in the case of laws prohibiting the sale of liquor, or requiring the Sunday-closing of saloons, stores, theaters, and other amusement places, and those prohibiting gambling and the social evil.

[1] C. F. Cahalane, *Police Practice and Procedure* (New York, 1914). This is the textbook used in the New York police school.

CHAP. XLVIII

Criminal courts and the police

The criminal courts must also be mentioned as essentially an integral part of the police system. They are provided for either in the city charter or in the general state laws. The judges in these "police courts" are usually elected by popular vote, which in reality often means that their selection is largely determined by political bosses and organizations supported by elements which are ready to pay for immunity from the enforcement of the criminal laws. Because of unfortunate experiences of this nature, popular election has been abandoned in New York and some other cities, and police magistrates are now appointed either by the mayor or the governor, with somewhat more satisfactory results. The spirit and methods of the judges in the criminal or police courts have much to do with the effectiveness of police administration. "Magistrates with an academic knowledge of the law, and without an intimate acquaintance with the habits of criminals and the difficulty which policemen encounter in securing absolutely legal proof in all cases, may destroy the zeal of a force by allowing notorious criminals to escape on technical grounds." On the other hand, "a magistrate too closely in sympathy with the police force and incapable of taking a detached view may err on the side of bureaucracy and help to cultivate in the force a spirit of contempt for the rights of the citizen, particularly when the citizen happens to be a poor man. This aspect of judicial tyranny has been illustrated many times in the case of strikes, when peaceful picketers have been arrested on charges of 'disorderly conduct' and railroaded to the workhouse by intolerant judges."[1] The system of admitting to bail persons accused of serious crimes is often abused, so that it reacts unfavorably upon the vigilance with which the police run down and apprehend violators of the law.

Special courts

In the past two decades noteworthy progress has been made in our cities in discriminating between various classes of offenders[2] and providing special courts for dealing with each class. For example, many, if not all, of our larger cities now have juvenile courts, under one name or another, for dealing with youthful offenders.[3] Some of these, like the juvenile court of Denver, pre-

[1] Beard, *American City Government*, 173-175. Judges of the higher courts also, through their rignt to decide appeals from the decisions of the police magistrates, have it in their power to strengthen or seriously impair the morale of the police force.

[2] G. Everson, "The Forgotten Army," *Outlook*, CXIX, 343-353 (June 26, 1918).

[3] T. D. Eliot, *The Juvenile Court and the Community* (New York, 1914); McLaughlin and Hart, *Cyclopedia of American Government*, I, 500-502.

sided over by Judge Ben B. Lindsey, have attracted nation-wide attention. Then there are so-called morals courts for dealing with social vice, and domestic relations courts to which are brought persons charged with the non-support or abandonment of wives, children, or poor relations. Speeders' courts, as the name implies, handle cases involving infractions of the ordinances regulating the driving of automobiles.

Psychopathic laboratories

Many a person arrested for a crime or misdemeanor has been found to be sub-normal, either mentally or physically, or both; and this sub-normality has a most important bearing upon the question of his responsibility and punishment. Such cases require special investigation and, after all the facts are known, special treatment. In some of our larger cities the ascertainment of these facts has been assigned to psychopathic laboratories, institutes, or hospitals, which are proving to be very valuable adjuncts to the criminal courts, especially in the case of sub-normal young persons.[1]

Punishments

In the matter of punishments also, especially of persons convicted of minor offenses, considerable progress has been made in the past few years. The parole system, involving the release of prisoners on probation, has been widely adopted, with conspicuously good results in Indianapolis and some other cities, and with less satisfactory results in Chicago. Highly beneficial consequences have also come from the new practice of allowing court fines to be paid in instalments. Finally, to supply the lack of suitable institutions for the detention of certain classes of offenders, farm colonies have been established by Los Angeles, Duluth, and other cities. Cleveland, for example, has a correctional farm for vagrants and a farm colony for boys and another for girls. "The purpose of these farms is to furnish a refuge where offenders may work out their own salvation, living in the open air and paying their own way."[2]

Fire department

Scarcely second in importance to the work of the police department is that of the fire department. Indeed the functions of the two impinge at several points, inasmuch as the police are frequently

[1] M. N. Goodnow, "A New Public Servant—The Municipal Psychopathologist, and His Task of Soul-Saving," *Nat. Mun. Rev.*, VIII, 306-311 (June, 1919).

[2] Los Angeles, Portland (Ore.), and some other cities have appointed officials, called public defenders, who, at public expense, conduct the cases of accused persons who are too poor to employ legal counsel. See M. C. Goldman, *The Public Defender; a Necessary Factor in the Administration of Justice* (New York, 1917); W. J. Wood, "The Public Defender," *Rev. of Revs.*, LXI, 303-307 (Mar., 1920).

CHAP. XLVIII

required to make the inspections which are necessary to the complete enforcement of many regulations laid down by the fire department. Not illogically, therefore, these two branches of municipal service are often brought together in a single administrative department presided over by a commissioner of public safety. In about two-thirds of the cities having a population of more than thirty thousand in 1917 the control of the fire department was vested in a single commissioner (whether or not combined with police administration), and for much the same reason that a single head is preferred to a board in the case of the police department. In the other third the department was in charge of a board or of a committee of the city council.[1] A decade or two ago, paid professional fire departments were to be found in only the largest cities; elsewhere, the work of fire-fighting was carried on by volunteer unpaid companies consisting of men who were employed most of the time in other pursuits. Now all this is changed; the city, be it small or large, which is without its professional, paid fire department is regarded as decidedly backward. In 219 cities of thirty thousand population in 1917 only 162 volunteer fire companies were reported by the census authorities, in comparison with 3,790 paid companies. Fire departments are regularly organized in small units or companies, which are stationed at different points throughout a city. In large cities the companies in a district of considerable size are organized into battalions. In any case, at the head of the active fire-fighting force is the fire chief or fire marshal, who may or may not be the administrative head of the department.

Organization

Functions: 1. Fire-fighting

One naturally thinks of the fire department primarily in connection with its most conspicuous activity, namely, fire-fighting. In this line of work, the equipment, methods, and achievements of American fire departments far surpass those of any European city. Nevertheless the annual fire loss in European cities is far less than in American cities. The reason is, chiefly, that in Europe greater stress has been laid upon measures designed to prevent the outbreak and spread of disastrous conflagrations than in the United States. There is, consequently, less need to spend large amounts of energy and money on the development of fire-fighting agencies. American cities, however, in the past few years, have been waking up to the truth of the old adage that an ounce of prevention is worth more than a pound of cure. About twenty cities now have separate bureaus of fire-prevention, organized within the fire department.

2. Fire prevention

[1] U. S. Census Bureau, *Statistics of Fire Departments in Cities*, etc. (1917).

Stricter building codes, supplemented by adequate inspection of buildings during construction and by frequent surveys of conditions adjacent to buildings with a view to the discovery and abatement of accumulations of rubbish and of careless and improper storage of explosives, are contributing in no small measure to the gradual reduction of our appalling fire losses. To render these forms of fire-prevention activity more effective, the fire department should be given some measure of police power, so that the department itself, without depending on the police force, may carry out regulations designed to safeguard life and property.

Popular interest in fire prevention is being stimulated. In about half of the states a "fire-prevention day" is observed, often combined with a "clean-up day," and in 1921 a serious effort was made to bring about a nation-wide adoption of this custom. In Seattle lectures by carefully selected members of the fire department have been given to large numbers of school children; and in Yonkers, New York, a similar end is attained by the organization of the school children into fire-prevention leagues. Every progressive fire department also disseminates information, either through the newspapers or in special circulars, concerning ways of reducing fire hazards. As a result of these varied efforts, the public is gradually coming to realize that fire prevention is entitled to rank in importance with preventive medicine in promoting the public safety and welfare.

Selection and training of firemen

With these increasingly varied duties to perform, the members of the fire department obviously ought not to receive their appointment to a place on the city's payroll as a result of personal or political favoritism, but only after satisfactorily passing a competitive examination similar to that now usually required of candidates for police appointments. Furthermore, after their appointment new recruits should undergo a probationary period of instruction in the duties which they will be called upon to perform. Appreciating the importance of this training, New York and Pittsburgh have opened schools for firemen, where instruction is given in modern fire-fighting, including ladder and hose drills, rescue work, pulmotor applications, and the use of fire towers.

Health and sanitary department

Few, if any, municipal functions are of more importance than the work of the health and sanitary department.[1] Yet the amount of city money set aside for that department is probably everywhere

[1] In some cities sanitary work, which partakes largely of engineering, has been assigned to a separate sanitary department or to the street department.

CHAP. XLVIII

less than the amount granted for police and fire protection or for education. In New York, where the most generous allowances have been made for health work, recent appropriations amounted to only about two per cent of the total annual expenditures, whereas five per cent went to the fire department and nine and twenty per cent, respectively, to police and educational activities. Few departments are brought into close contact with so many other branches of the city government as is the department charged with protecting the public health. It is brought into relation with the bureau in control of water supply and purification, with the department or bureau in charge of garbage collection and disposal, with the sewerage and street cleaning departments, with the police department in the enforcement of the sanitary code, and with the educational authorities, especially in the matter of medical and dental inspection of school children. Harmonious coöperation with all of these various bureaus and departments is, therefore, indispensable to the proper functioning of the health department, a condition which, unfortunately, by no means always exists.

Organization

In commission-governed cities, health protection is usually combined with police and fire administration in the department of public safety; but elsewhere, especially in the larger places, there is a separate department of health, at the head of which a board or commission is more frequently found than in the case of the police and fire departments. In New York City, for example, health administration is in the hands of a composite board composed of the health commissioner, who is the department's responsible head, the police commissioner, and the health officer of the port, the latter a state official. In Chicago and many other cities, on the other hand, the health department is presided over by a single commissioner, appointed by either the mayor or the city council. Many places, especially small or medium-sized cities and villages, do not employ full-time health officers, and such public health activities as are carried on are looked after by a physician who devotes most of his time to his private practice. Under these conditions, a real health department is, of course, practically nonexistent, and public health activities are apt to be of a very restricted sort. Occasionally two or three small cities lying close together, *e.g.,* La Salle, Peru, and Oglesby, Illinois, have combined to employ a full-time health officer and develop a joint health administration, to the great advantage of each community con-

cerned. Such a policy ought to commend itself, not only to neighboring small cities, but to towns and villages as well.

Powers and activities of the New York health department

Probably no health department is better organized, carries on a wider range of activities, and is more efficiently administered, than that of New York City. Here the board of health enacts the sanitary code of the city, issues emergency health orders, and has very broad powers in all matters affecting the public health; on extraordinary occasions, it may even destroy property, imprison persons, and forbid traffic and intercourse in order to check the spread of disease. Under the general supervision of the board of health, and under the direct control of the commissioner of health, are the following nine bureaus:

(1) The bureau of administration, which coördinates and supervises the activities of the other bureaus and serves as the medium of communication with other departments of the city government; (2) the bureau of records, which collects, preserves, and publishes vital statistics, issues burial permits, registers all practising physicians, assists in the enforcement of child-labor and compulsory-school-attendance laws, and conducts all other statistical work of the department; (3) the sanitary bureau, which has general jurisdiction over sanitary conditions, investigates reported nuisances, controls slaughter-houses and livery stables, and makes a detailed sanitary survey of the entire city; (4) the bureau of preventable diseases, which is responsible for the registration, sanitary supervision, and necessary care of all cases of communicable diseases, the maintenance of the ambulance service, the disinfecting of premises and goods, the holding of tuberculosis and other clinics, and the organization and distribution of a large staff of field nurses; (5) the bureau of child hygiene, which has general supervision and care of the health of infants and children (including medical inspection and physical examination of all school children), holds eye and dental clinics in the schools, and supervises infant milk stations, day nurseries, and all institutions caring for dependent children; (6) the bureau of food and drugs, which investigates and controls the food and drug supply of the city, and conducts not only the inspection of foodstuffs but also the sanitary inspection of the premises where foods are stored, handled, prepared, or sold, and inquires into the physical condition of persons who prepare or serve food in hotels, restaurants, and other public eating-places; (7) the bureau of laboratories, which carries on

CHAP. XLVIII

varied forms of research work, maintains supply stations at drug stores throughout the city where physicians may obtain diphtheria antitoxin and vaccine, and makes scientific studies of such diseases as tuberculosis, diphtheria, cholera, and typhoid fever, and devises modes of combating them; (8) the bureau of hospitals, which supervises the five hospitals maintained by the department for the care of persons afflicted with communicable diseases; and (9) the bureau of public health education—one of the most recent and important divisions of the department—which has charge of the dissemination of information concerning the health of the community, the securing of better coöperation between the department officials and the public, the publication of health literature, including weekly and monthly bulletins for the information of physicians, the giving of health lectures to city employees and the public, the organizing of exhibitions and moving-picture shows, and not a few other activities.[1]

Emphasis on preventive measures

This summary will serve to give some idea of the great variety of functions that may fall to the lot of a health department in any large city. Many of the activities noted are not carried on at all in some cities, either by the health department or any other branch; on the other hand, the health department in some cities is made responsible for the cleaning of streets and alleys, for tenement house inspection, and for other activities which in New York are assigned elsewhere. The summary also brings out forcibly the fact that whereas formerly the work of the health department consisted almost wholly in discovering and abating nuisances and in fighting epidemics that might have been prevented, effort nowadays runs chiefly along the lines of preventive medical or sanitary science. "Health departments, properly equipped and based on correct principles . . . are veritable armies waging war on the causes of disease, no matter how subtle or remote they may be, no matter whether lurking in the home, the school, or the workshop."

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CHAPTER XLIX

OTHER MUNICIPAL ACTIVITIES—CITY FINANCE

The preceding chapter sketched the principal city activities which spring from the primary function of all government, the protection of life and property. Many activities of the modern city, however, have little or nothing to do with the citizen's protection and involve the exercise of powers which are neither necessary nor peculiar to government as such. They are, rather, engineering, commercial, or social enterprises—undertakings such as might be, indeed often have been, carried on by private persons or corporations. To some of them, and to the subject of municipal finance, the present chapter will be devoted.

Public works:

A city's engineering activities are commonly grouped in a single department of public works, although in many instances they are distributed among several departments. At the head of the department of public works one rarely finds a board or a commission, as in the case of health and education departments, but almost invariably a single commissioner, who is often a person with some engineering experience, although this is not absolutely essential if his subordinates include properly trained engineers and other technical experts. But under any circumstances the headship of the department of public works in a city of considerable size calls for a man of large administrative ability and business experience.

1. Water supply

The most common forms of municipal public works in this country have to do with the water supply, the city's wastes, and the city's streets. First in importance comes the provision of an adequate water supply for domestic and industrial purposes. The storing and distribution of water is primarily an engineering enterprise, but one which in the great majority of cities has been made a municipal, rather than a private, business because of the intimate relation which the water supply bears to the health of the community and to the efficiency of its fire department. It is also one of the most remunerative of the city's enterprises and is therefore

often made to contribute to the support of other activities of the city government. Sometimes an adequate supply can be obtained only, or at all events most satisfactorily, at a distance of a hundred miles or more, entailing the construction of elaborate and costly engineering works, as in the case of New York[1] and Los Angeles. Even so, the service can usually be made to pay for itself in a reasonable time, and thenceforth to yield a net revenue.

In many places the water supply, in its natural condition, is so turbid or muddy, or so impure, or both, as to require special treatment before being used for domestic purposes. To eliminate turbidity, water is often stored in huge reservoirs or tanks where sedimentation is hastened by the introduction of quantities of alum. To sterilize water and thus destroy most of the harmful bacteria in it, liquid chlorine gas is in common use, being injected frequently and in carefully measured quantities. To remove, not merely to kill, noxious bacteria, filtration plants have been rapidly introduced in many of our larger cities. The removal in this way of practically all disease-breeding bacteria has usually been reflected almost immediately in a lowered death-rate from typhoid fever. Two kinds of filters are in common use, the slow sand-filter and the rapid sand-filter; both are based on the same principle, namely, the removal of impurities by forcing the water slowly, and at a carefully regulated rate, through several successive layers of gravel and sand.[2] The largest slow sand-filters are at Albany, Philadelphia, Pittsburgh, and Washington. The Philadelphia filters constitute the largest plant of the kind in the world, and have a capacity of four hundred million gallons daily. Rapid sand-filters are better suited to the needs of cities whose water is turbid at certain seasons of the year, and are therefore more commonly found in the Middle West, the largest being at Cincinnati and Columbus, Ohio.

2. Waste collection and disposal

The collection and disposal of wastes is everywhere an important municipal activity, although far more is undertaken in this matter in some cities than in others. Few people appreciate the fact that, counting all kinds, a city's wastes exceed a ton a day per capita. In every city of some importance the problem of their collection and disposal is, therefore, one of serious magnitude.

[1] On the New York-Catskill system, see J. L. Stockton, "The City's Water Supply," *Outlook*, CXXIII, 182-188 (Oct. 1, 1919).

[2] M. F. Stein, "How Filtration Plants Work," *American City*, XIII, 233-237 (Sept., 1915); G. A. Johnson, *Purification of Public Water Systems* (Washington, 1913).

CHAP. XLIX

Garbage

There are five principal forms of municipal waste, namely, ashes, inorganic rubbish, street sweepings,[1] garbage, and sewage. The collection and disposal of the first three present no serious difficulties and are often left to private individuals or concerns. Garbage and sewage, on the other hand, offer problems of much seriousness and importance. Garbage comprises chiefly the kitchen wastes from hotels, restaurants, and private dwellings, and hence materials in which putrefaction early sets in and which soon becomes offensive, if not actually dangerous to health. Garbage collection and disposal is in some cities wholly a municipal undertaking; in others it is left to private parties; while in still other cases a combination of the two methods is found. Similarly, the waste is disposed of in a variety of ways. Some cities, *e.g.*, Denver and Omaha, own hog-farms or piggeries on which the animals are fed the city garbage. Others, as Milwaukee, Minneapolis, and Memphis, have incineration plants where garbage is burned, either along with rubbish or separately. In recent years garbage reduction plants have come into favor in Chicago and elsewhere, the oils and fats being extracted for commercial use in the form of soaps and axle-grease, leaving a residue which is saleable as a fertilizer.

Sewage

Sewage consists primarily of water-borne human effluvia from dwellings and wastes from many industrial plants such as laundries and slaughter-houses. More than other forms of waste, this bears the germs of disease, and its proper collection and disposal become of prime concern to the health of the community. One of the earliest and most important of municipal engineering activities is therefore the installation, operation, and maintenance of an adequate sewerage system, consisting of trunk lines, lateral branches, and connections for each building used as a dwelling or for commercial or industrial purposes. In many cities the problem is not solved with the construction of the sewerage system, the chief purpose of which is to collect sewage and carry it off; there remains the question of final disposal. In cities on the ocean or large lakes or rivers, this problem of disposal may find ready solution. But where the same lake or river serves as the source of water supply for other communities, different methods of disposal have to be found, or the sewage must be subjected to special treatment before

[1] C. Aronovici, "Municipal Street Cleaning and Its Problems," *Nat. Mun. Rev.*, I, 218-225 (Apr., 1912); M. J. Joseph, "Disposal of City Wastes" [in New York City], *Outlook*, CXXIV, 67-71 (Jan. 14, 1920).

it is turned into the lake or stream in question. Following the example of some European cities, Pasadena and Salt Lake City have large sewage farms upon which the sewage is allowed to flow, serving the purpose of irrigation in the cultivation of fruit and vegetables. Other cities, *e.g.*, Worcester and Providence, use large sedimentation basins or tanks for the separation of the solid matter from the water before the latter is turned into a water-course. Still other methods of sewage treatment which have been rapidly introduced in the past few years are the intermittent sand-filtration process, the percolating or sprinkling-filter system, contact beds, and especially the activated sludge process, which is now being used in Milwaukee, Chicago, and other cities.

3. Streets

Within the jurisdiction of the department of public works, when not assigned to a separate department of streets, as is sometimes the case in large cities, falls the work of planning the width and direction of city streets, making the necessary surveys, curbing, paving, repairing, sprinkling, and lighting the streets, and laying sidewalks. Enormous progress has been made during the past few years in both street paving and street lighting. One seldom comes across a city nowadays, no matter how small, in which at least the principal streets are not paved, and in which all are not lighted by either gas or electricity. Brick and wooden blocks for retail business and residential streets have practically displaced the macadam of a former generation; in the residential and boulevard sections miles of concrete or asphalt roadway are to be found in every city of considerable size; while in the heavy traffic sections granite blocks are often employed. In the majority of cities street lighting is not carried on directly by the municipality, but is done by private corporations under contract. Nevertheless there has been a noteworthy increase in the number of cities owning and operating their own electric lighting plants for street and commercial purposes, although the same cannot be said with respect to gas-works.

Direct or contract work

Other activities included in the term public works are the erection and maintenance of the city hall and other buildings owned by the city, the construction and care of bridges, and in some places the care and upkeep of parks, playgrounds, and cemeteries and the operation of municipal markets and transportation systems. In carrying on the varied enterprises mentioned every city is called upon to decide whether it will lay the sewers, pave, repair, and clean the streets, and erect public buildings with its

CHAP. XLIX

own labor force and materials, or whether it will let out the work on contract to be done by private parties under carefully specified conditions. Each system has its advantages and its disadvantages; and experience shows that in some kinds of work the direct plan is quite satisfactory, while in others the contract system yields better results. In many cities both systems are in use. The construction of the great majority of public works is, however, done under the contract form. It is not difficult to see why "machine" politicians are especially eager to obtain control of the department of public works. By so doing they can secure lucrative contracts for their friends and well-paying employment for their humbler political followers. Philadelphia, for example, has long suffered from the pernicious influence of city contractors in municipal politics.

Social-welfare activities

Municipal functions which, for want of a better classification, may be lumped together as social-welfare activities, have increased astonishingly both in number and variety during the past fifteen years. Practically every city, however small, carries on at least two or three such activities, and in our larger cities the number is almost legion. So rapidly has this form of municipal activity developed that some twenty cities have, since 1908, formally recognized its importance by creating, under one name or another, departments or bureaus of social welfare. Among such cities are Dayton, Chicago, Kansas City, Los Angeles, Indianapolis, St. Louis, Minneapolis, and Springfield (Mass.). In probably no other is the work of the welfare department so comprehensive in scope, so well organized, and so efficiently performed as in Dayton. These departments or bureaus of social welfare have taken over many phases of philanthropic or charitable work previously performed by private individuals or unofficial organizations. The municipalization of such activities has grown out of the increasing realization that society at large should regard the defective, delinquent, and otherwise handicapped classes in the city as, in a sense, the wards of the community, and should therefore provide, through governmental machinery, ways and means of promoting their physical, moral, and economic welfare. The development is based on the belief that it is just as much the duty of a city to concern itself with the special problems of human life, of community efficiency and betterment, as to concern itself with questions of police and fire and health protection, garbage and sewage disposal, and education.

Scope

The multifold character of welfare work—which may or may not be carried on under a formally organized welfare department—may be seen from the following list of more or less common welfare activities and agencies: the establishment of free employment bureaus; the relief of poverty and other forms of individual and family distress; investigation and prosecution of "loan sharks" who prey upon the poor; granting mothers' pensions; giving legal aid to those who are too poor to employ a lawyer; maintaining infant milk stations, day nurseries, and child-welfare stations; employing a staff of visiting nurses to give instruction and care in maternity cases; instructing the children of the poor, and, through them, their parents, how to improve the home and reduce the cost of living; establishing municipal lodging-houses and municipal tenements; providing properly chaperoned dance-halls and other forms of indoor entertainment; conducting manual training, vocational, and "Americanization" classes; creating insurance and loan-savings institutions; interesting children in gardening; providing free public baths and public laundries; organizing folk dances and neighborhood and community pageants; and conducting investigations and researches into important sociological problems such as the causes, extent, and remedies for poverty, disease, and juvenile delinquency. The establishment and maintenance of parks and playgrounds have long been recognized as legitimate municipal activities in all our larger cities; but the number of small parks and playgrounds and neighborhood centers, with their varied opportunities for both indoor and outdoor recreation, have been greatly multiplied in recent years in cities of all sizes. With this development has also come the systematic supervision of games of all sorts and of field athletic sports by competent playground leaders. Long as the list may seem, it by no means includes all of the welfare activities now carried on in American cities; nor does it include numerous other important municipal activities carried on by European cities, whence, indeed, has come much of the inspiration for this sort of work in the United States.[1]

Education

Educational activities are among the oldest of municipal functions in the United States. Like towns and villages, cities are given large freedom in organizing their public school system and in raising money for its support; and few activities have been more gen-

[1] See M. K. Simkhovitch, "The City's Care of the Needy: a Program for a Department of Charities," *Nat. Mun. Rev.*, VI, 255-262 (Mar., 1917); A. T. Burns, "Private and Public Welfare Activities," *ibid.*, VI, 263-268 (Mar., 1917); H. C. Carbaugh, *Human Welfare Activities in Chicago* (Chicago, 1917).

CHAP. XLIX

erously upheld. As a rule, school affairs are not directly under the control of either the council or the administrative departments, but are placed under the more or less separate and independent jurisdiction of a school board or committee, or a board of education.

School boards

Exceptions to this practice are to be found chiefly in some of the commission-governed cities. Formerly, school boards of over forty members were in existence.[1] But the recent tendency has been in the direction of smaller boards, and they now range from three and four members in Albany and San Francisco, respectively, to eleven and fifteen in Chicago and Philadelphia. Members are chosen in a variety of ways, the two most common being popular election, as in Boston and Cleveland, and appointment by the mayor, as in New York and Chicago. In other cities, especially in the South, the board is appointed either by the city council or by the courts. Terms of office vary from one year in some of the smaller cities to five and six years in New York and St. Louis, respectively; two years is perhaps the most common period. The tendency is to lengthen the term and to reëlect members who are willing to serve a second or third term. In the great majority of cities the members serve without compensation, although in San Francisco and Rochester, for example, they are paid.

Duties

Upon these school boards is placed the responsibility for the administration of the entire public school system. They attend to the selection and purchase of land and buildings for school purposes, and pass upon plans and specifications and let contracts for the construction of buildings; they provide the necessary fuel and other supplies and janitor services; they are the custodians of all school property; they determine many points connected with the educational policy of the city; they estimate the sums needed for educational purposes each year and either ask the city council for the amount or, if their authority permits, make a direct tax levy; finally, they appoint the school superintendent and have more or less to say in the appointment, promotion, and transfer of teachers. The superintendent is the responsible expert executive directly in charge of the educational activities of the schools. He, therefore, holds a position in relation to the school board very closely analogous to that held by the city manager under the commission in cities having managerial government.

[1] In New York, for example, the board of education until recently consisted of forty-six members, appointed by the mayor for a five-year term. At present the board consists of seven members, serving without pay.

Expansion of educational activities

The past ten or twenty years have witnessed a remarkable expansion in the educational and allied activities of American cities. These now include medical, dental, and psychopathic examination of school children; special classes for children found to be mentally or physically defective; evening classes for immigrants and illiterates; vocational guidance, including manual training, domestic science, and commercial courses; the operation of low-priced or free lunchrooms for school children; and numerous other activities. Many persons now in early middle life can remember when few, if any, school houses were ever used outside of school hours; indeed few school houses were lighted in any way for use after dark, and their use for political purposes was simply unthinkable, while within the sacred precincts of the school yard no one was permitted to loiter after the close of school in the afternoon. Now all this has been changed in a hundred or more cities; schoolhouses are lighted with gas or electricity and thus are made available for evening lectures and entertainments and as centers of neighborhood sociability; the school yard has been enlarged and transformed into a general public playground equipped with special apparatus, to which the children of the neighborhood are not only permitted, but urged, to resort at any time outside of school hours. Moreover, hundreds of school houses throughout the country are now used as polling-places on election day, and even some of the so-called conservative New England states permit public meetings, including political gatherings during electoral campaigns, to be held in them.

Municipal finance

To carry on these manifold municipal activities, and to meet the steadily increasing demands which are being made upon all of our city governments, the collection and expenditure of immense sums of money are required. "New York City is obliged to raise every year about as much money as all the southern and western states of the Union put together; its annual budget is larger in amount than that of Denmark, Norway, Sweden, Holland, or Greece; it has to collect more money each year for purely municipal purposes than London, Paris, and Berlin combined."[1] Partly because of these increasing demands upon the city's exchequer, and because the cost of living for governments as well as for individuals has enormously increased during the past few years, many cities are now finding it extremely difficult to raise the necessary funds to carry on present activities—to say nothing of taking on

[1] W. B. Munro, *Principles and Methods of Municipal Administration*, 403.

CHAP. XLIX

new functions—without resorting to burdensome taxation. This is especially true of some of the largest cities, which hitherto derived a very considerable share of their revenue from liquor licenses—a source which suddenly dried up after the enactment of the eighteenth amendment of the national constitution.

Sources of income

The principal sources of municipal revenue are: (1) direct taxes on real and personal property, which now furnish by far the largest part of the revenue of every American city, the rate of the tax being fixed by the city council or commission and limited in many states by constitutional or statutory provisions; (2) taxes derived from public service corporations, such as street railways, gas and electric lighting companies, and telephone companies, and assessed upon the company's real estate, on its capital stock, on its mileage, or on its net or gross earnings; (3) poll taxes in a few cities, including Boston and Philadelphia, the returns from which are comparatively small; (4) license fees exacted from a multitude of different enterprises and pursuits, including theaters, motor vehicles, street vendors, and plumbers; (5) state grants or subventions for special purposes, such as education and sometimes highway improvement; (6) income from municipal enterprises, especially from water-rates and the sale of electricity to private consumers, and from a few municipally-owned street railways—sources which are vastly more productive in European than in American cities; (8) endowment or trust funds provided by private benefaction, the income being usable for certain specified activities, especially along social-welfare lines, notable instances being found in Cleveland[1] and a half-dozen other large cities; (9) trade or business taxes, found in New Orleans and some other municipalities of the South and West, and much less common than in French and German cities, though, in view of the cutting off of revenue from licenses, likely to be more widely adopted in the near future; (10) special assessments levied upon property-owners to meet a large part of the cost of local improvements, such as street paving and laying sewers; and (11) special land taxes and unearned increment taxes, which are being experimented with in a few cities and are likely to be considerably developed in coming years.[2]

[1] See H. J. Reber, "The Community Trust," *Nat. Mun. Rev.*, VI, 366-371 (May, 1917).

[2] R. M. Haig, "New Sources of City Revenue," *Nat. Mun. Rev.*, IV, 594-603 (Oct., 1915); L. W. Lancaster, "Sources of Revenue in American Cities," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 123-132 (May, 1921).

Indebtedness

The total revenue from all of these sources is, as a rule, scarcely adequate to meet ordinary running expenses. Consequently, when new enterprises are started resort generally has to be made to loans. These usually take the form of either sinking fund or serial bond issues.[1] Many charters or state laws require a popular referendum to be taken before bonds of either description can be issued. Furthermore, in practically all states there is either a constitutional or a statutory limitation upon the amount of indebtedness that cities may incur.[2] The object of the latter restriction is wholesome. But, although the debt limit is usually fixed in some ratio to taxable valuation, and is therefore not strictly uniform, it takes no account of the varying resources and financial condition of different cities, and, in its actual operation, is open to serious criticism. Nothing of the sort is found in European countries.

Budgetary methods

Subject to such limitations as may be set by the state constitution or laws, determination of the kinds of taxes to be employed and the amounts to be levied is exclusively a function of the council or commission, as the body directly representing the taxpayers. It is likewise exclusively a function of this body to pass the annual appropriation ordinance, allotting the city's income to the various departments and activities. The compilation and revision of the estimates of the financial needs of the various departments, together with a forecast of the amount of revenue to be expected from various sources—in other words, the preparation of the budget—is another most important phase of the city's financial activities. Different cities follow different budgetary methods: in New York the preparation of the budget is assigned to a special body called the board of estimate and apportionment, consisting of the mayor, the comptroller, the president of the board of aldermen, and the five borough presidents;[3] in Chicago and many other cities not under commission-government the budget is prepared by a committee of the city council; in commission-governed cities it is prepared by the commission, and in commission-manager cities by the manager; while in Boston and some other places the mayor alone is made responsible for the program of expenditures.

[1] See p. 669.

[2] H. Secrist, "Constitutional Restrictions on Municipal Debt," *Jour. Polit. Econ.*, XXII, 365-383 (Apr., 1914); also *Nat. Mun. Rev.*, III, 682-692 (Oct., 1914).

[3] L. Hall, "Paying the City's Bills," *Outlook*, CXXIV, 474-477 (Mar. 17, 1920); M. B. Sayles, "The Budget and the Citizen," *Outlook*, XCII, 1048-1059 (Aug. 28, 1909).

CHAP. XLIX

Segregated and lump-sum budgets

The enactment of the budget, with or without modifications, takes the form of the annual appropriation ordinance, and is the proper function of the city council or commission. In this way that body is made responsible, at least in part, to the taxpayers for the uses to which the city's money is put. Sometimes the mayor is given a limited veto power over separate items in the appropriation bills; and in Boston, New York, and a few other cities the council may modify the budget as presented to it only by reducing the amount appropriated for any given purpose or by striking out items. In New York and Philadelphia the budget as finally passed minutely specifies the nature and amount of each authorized expenditure for every branch of the city government, making a total of about twenty thousand items, and filling a volume of five hundred or more pages. At the opposite extreme from these highly segregated budgets stands the lump-sum budget, now rapidly going out of favor, in which only a few items are specifically mentioned, each department being given a lump sum for salaries, wages, and materials, which may be expended almost entirely at the discretion of the department head. Each of these budgetary systems has its merits, and neither is without drawbacks and defects. In the recent adoption of a budgetary system calling for the specification of about three thousand items, Boston has perhaps struck as happy a medium as any of our larger cities. The budget provisions of the Dayton commission-manager charter are also deserving of careful study.

Assessment and collection of taxes

The assessment of taxes, the collection of revenues from all sources, and their expenditure in accordance with the appropriation ordinances are distinctly administrative functions which are exercised by one or more city departments or officials. The assessment of property for the purpose of municipal taxation is sometimes performed by county officials, but generally each city forms a separate unit with its own corps of assessors, who seldom, if ever, enter upon their task with any such previous training or experience as would enable them to perform this extremely important work with any approach to scientific method or accuracy. In recent years a few cities have introduced improvements in this connection which have attracted wide attention.[1]

Disbursements and accounts

The city treasurer serves as the custodian and disbursing officer of municipal funds. The revenues of the city may be paid to him directly by the taxpayers or collected by another official called the

[1] See p. 660 and note.

city tax collector and then turned over to the treasurer. Department heads draw requisitions or warrants upon the treasurer from time to time for the amounts allotted to their department in the appropriation ordinance. But before these warrants can be honored by the treasurer they must be approved by the city auditor or comptroller.

Finally, it is highly desirable that the accounts of all city departments be kept in accordance with a single, uniform, scientific method. This feature of an up-to-date fiscal system is unfortunately too frequently lacking. But the past few years have brought rather widespread adoption of improved methods of departmental accounting, as is notably illustrated in Philadelphia and Dayton. On the whole, there has been considerably more success in reforming the financial, purchasing,[1] and other business methods of cities than in introducing corresponding improvements in the governments of the states.

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CHAPTER L

TOWNSHIPS, VILLAGES, AND SPECIAL DISTRICTS

Other local government units

Next to cities in importance as local government units are the towns and townships which are found in the great group of states comprising New England, New York, Pennsylvania, and the North Central states, including Nebraska and the Dakotas. In the South and Far West, on the other hand, township government is practically non-existent. Functions which elsewhere are performed by town government are, in these latter regions, exercised by the county authorities, or are divided up among relatively unimportant county divisions (like the road districts in some Illinois counties), which have no corporate powers and seldom have the authority to levy taxes. In sharp contrast with these anemic local government units of the South and West are the town governments of New England, which are still vigorous and flourishing, although some of them are older than the counties and states under which they operate.

The New England town

The town-meeting

New England towns[1] have practically all of the rights of municipal corporations, and, although without charters, they enjoy almost all of the powers that a city charter confers. In addition to the management of purely local affairs, the town acts as the agent of the state in the assessment and collection of taxes, in keeping records of vital statistics and of land transfers,[2] in enforcing health laws, and in various other ways. Except in one or two states, the town is also the unit of representation in the state legislature for one house, or even both houses, and everywhere it is an election district for state and national purposes.

Most of the powers granted to New England towns are vested in, and exercised by, the town-meeting, which is the principal organ of town government. This is a mass-meeting of the qualified voters

[1] The New England town is not necessarily an urban center. Some of the towns are such, and have populations running into the thousands. But most of them are rural communities covering as much as twenty-five or thirty square miles. In other words, geographically they are broadly similar to the townships of other parts of the country.

[2] In Vermont, Connecticut, and Rhode Island.

of the town, held at least annually in the town hall. The assemblage is primarily a legislative body; and the actions that it takes may relate to a great variety of subjects of local interest, including the upkeep of the town water-works, cemetery, library, high school, the town hall, and other public buildings and property; construction of a sewerage system; laying out and improving highways; authorizing contracts for street lighting; enacting local police regulations, known as by-laws; and, until recently, deciding whether licenses should be granted for the sale of liquor. An especially important function is that of providing the necessary financial legislation to meet the expenses of these and any other town enterprises; so the town-meeting fixes the tax rate, appropriates money for the different town activities, including the support of the public schools, and authorizes the borrowing of money when such a step becomes necessary. In the discussion of these varied items of business any voter present has the right to participate; and non-voters are also sometimes allowed to speak. But proceedings are carried on with at least nominal regard for the rules of parliamentary law. Not infrequently, subjects come up for consideration which rouse very general interest, and even divide the townspeople into hostile camps, and under these circumstances the proceedings reach their maximum of interest, and are attended by much of the excitement, speechmaking, and parliamentary manœuvering that characterize political conventions. At other times, proceedings are dull and lifeless, following merely the customary formality and routine.

As towns grow in population,[1] a general mass-meeting is found unwieldy and ill-adapted to the expeditious and thoughtful handling of business. Consequently some large towns have a permanent or standing advisory committee of from ten to forty members, appointed by the selectmen, to investigate any subject referred to them and to report their recommendations at a later meeting. Special committees are also sometimes designated for the same purpose. As a rule, committee recommendations carry great weight with the assembled voters.

Executive officers

The policies determined upon in town-meeting are carried out, the taxes levied are collected, and the appropriations authorized are expended, by officers chosen by the town-meeting and directly

[1] The largest New England town is Brookline, Massachusetts, just outside of Boston, which has a population of more than 30,000. This town has recently adopted a limited town-meeting system. See E. A. Cottrell, "Recent Changes in Town Government," *Nat. Mun. Rev.*, VI, 64-69 (Jan., 1917).

CHAP. L

responsible to it for the greater part of their official acts. But instead of a single chief executive to carry into effect the will of the local lawmaking body, one finds a variety of boards or single officials, usually chosen directly by the voters in town-meeting. The most important of these is the small group of three, five, or sometimes nine, persons called the selectmen. Chosen by the town-meeting, and comprising a sort of executive committee of that body, these officials act almost entirely as the town meeting directs and hence enjoy very little independent or discretionary authority. They are generally elected for a single year, though reëlections are very common; and they manage town affairs from one general meeting to the next. Second to them in importance is the town clerk, also elected annually in the town-meeting, but often continued in office year after year until he becomes the acknowledged authority on town history, precedents, and genealogy. He keeps the records of the town-meeting, issues marriage licenses, prepares vital statistics, and in Vermont, Rhode Island, and Connecticut records deeds, mortgages, and other legal documents. There is always a town treasurer, sometimes an auditor, and invariably at least one constable to arrest violators of the law, serve court processes, and act as tax collector. There is also an elected school committee, or board, which in most New England states has the direct control of all the town schools. Finally, there is a long list of minor officials, most of whom are appointed by the selectmen and have merely nominal duties: for example, justices of the peace; road surveyors charged with keeping public roads and bridges in repair; field-drivers and pound-keepers; fence viewers, who settle disputes among farmers in regard to boundary lines; sealers of weights and measures, who test the accuracy of scales and measures; surveyors of lumber; keepers of almshouses; park commissioners; fish wardens; hog-reeves; inspectors of various kinds; and numerous other minor officials, some of whom bear queer titles and have merely nominal duties. Many of these officers serve without pay or, at the most, receive small fees.

Selectmen

Clerk

Treasurer

School committee

Miscellaneous officers

Western townships

Unlike the towns of New England, New York, New Jersey, and Pennsylvania, which have very irregular boundaries and differ greatly in area, the townships of the middle western states are, with rare exceptions, of uniform size and shape, consisting of a rectangle approximately six miles square with straight sides.[1]

[1] The rectangular system is also found in the northern part of Maine.

These are often called civil townships in order to distinguish them from the geographical or congressional townships of the same size and shape which were mapped out when the original land-surveys were made under authority of an act of Congress. Their boundaries may or may not coincide with those of the congressional townships, but there is no necessary legal or political connection between the two. Congressional townships are found practically everywhere west of the Alleghenies, whereas civil townships exist only in the middle western states; and in several of these, notably Illinois, Nebraska, and Missouri, they are to be found in only certain parts of the state. The boundaries of civil townships are always determined by the state or county authorities, whereas those of congressional townships are prescribed by officials of the national government. Finally, the civil township is an important unit of local government, while the congressional township has no governmental organization and performs no governmental functions, serving almost solely as the basis for land surveys and records.

Township government

Although the western civil township, as a municipal corporation, has substantially the same legal status as the New England town, and has elective officers closely corresponding both in title and in functions to those of its eastern prototype, the most distinctive feature of New England town government, *i.e.*, the town meeting, is either entirely absent or exists in a greatly attenuated form. Town officers may be elected in what is called a town-meeting, and questions may be submitted for popular approval. But in the northern tier of central states, as indeed also in New York and New Jersey, township meetings have very much less authority than in New England; nowhere west of the Hudson does the town-meeting show any such vitality as has characterized it in its native habitat.[1] And in the southern tier of central states, including Pennsylvania, Ohio, Indiana, Iowa, Kansas, and Missouri, there is no assembly of the township voters at all.

Corresponding to the New England selectmen—a title, however, which nowhere appears in the central states—is a committee or board of supervisors or trustees in Pennsylvania, Ohio, and Minnesota. In other states there is a well-defined head official, quite unlike any New England official, called the supervisor in New York, Michigan, and Illinois, and township chairman or township

[1] See *Ill. Const. Conv. Bull.*, No. 12 (1920), "County and Local Government in Illinois," 1024 ff.

trustee in other states. Remaining township officers correspond rather closely, both in name and function, to the officers of the New England town.

On the whole, township government, outside of New England, plays a relatively unimportant rôle. This is especially true in the West, where the township is an artificial area, almost totally lacking the social unity of the old New England town. Other factors go to produce the same result: the relatively larger part taken by county officials in poor-relief, and in highway and school administration, and the common practice of incorporating portions of townships as separate municipal corporations, thus taking them largely out from under the jurisdiction of the township authorities. To a brief description of the most important of these corporations, called villages, a few paragraphs must be devoted.

Villages

When a portion of a township, or of a county which does not have township government, becomes more thickly settled than the rest and begins to take on a semi-urban aspect, its inhabitants are certain to demand more in the way of special public services, such as fire protection, street paving and lighting, water-supply and sewerage facilities, than the township or county authorities will care to undertake to provide. Sooner or later, therefore, such communities usually become incorporated as villages or boroughs. State law often requires that a community seeking incorporation as a village shall have a certain minimum population and occupy a certain minimum area, and that the question of incorporation shall have been previously submitted to popular vote. In Illinois, for example, any area of not less than two square miles, with at least three hundred inhabitants, if it is not already within a village or city, may be incorporated as a village by a vote of the people at a special election. It remains a village until it has a thousand inhabitants, when it may, but is not obliged to, change to a city government.[1] On the other hand, there are villages in Vermont, Maine, and Connecticut with as few as forty-two, eighty-three, and thirty-four inhabitants, respectively. Incorporation gives the village the power to undertake the special community services mentioned above, and for these purposes to borrow money and raise taxes, and to have its own village government distinct from the governments of township and county. There are more than ten

[1] Oak Park, a suburb of Chicago with more than 30,000 inhabitants, still retains the village form of government. Speaking broadly, the distinction between cities and villages is not one of size or importance but merely one of legal status.

thousand of these incorporated villages in the United States. They are found in all parts of the country, including New England and the southern and western states; but by far the greater number are in the north central section, there being about eight hundred in Illinois alone. In this region they are also relatively larger and more important than elsewhere. The boroughs of Connecticut and Pennsylvania and the incorporated towns of Illinois are merely villages under other names.

Village government

The government of villages is a comparatively simple affair. In some states, notably New York, there is a village meeting much like the town meeting, but attended, of course, only by the qualified voters of the village. In most states, on the other hand, there is no such meeting and the decision of practically all questions is left to certain elected officials. In such villages the principal governing body is the village board, called by such various names as trustees, assessors (Maine), commissioners (New Hampshire), burgesses (in boroughs), or the village council. Other village officers include a mayor or president or chief burgess, who is the village chief executive, and is sometimes given a veto upon the acts of the village board; also a clerk, a treasurer, a marshal or police officer, and a police magistrate with functions similar to those of a justice of the peace. Thus in structure and functions the government of villages bears a striking resemblance to the government of cities, except, of course, that it is on a decidedly smaller scale. Indeed it might almost be said that villages are miniature cities; at any rate, they often mark transitional stages in the evolution of cities from what were originally rural communities.

Special, or quasi-municipal, corporations

No description of local government in the United States to-day is complete which does not at least mention the newer districts that have been created in many parts of the country to fulfil some special purpose for which the older units of local government have been found wholly or largely inadequate. These are commonly called special, or quasi-municipal, corporations, in order to distinguish them from the older municipal corporations called cities and villages. Sometimes these newer districts lie wholly within the boundaries of a city, a town, or even a village; and generally they are entirely within a county. Nevertheless their boundaries seldom coincide exactly with those of the older political subdivisions. In the majority of instances, they are unions of two or more villages, townships, or small cities, or they comprise territory lying within more than one such unit. At all events, and despite

CHAP. L

the fact that they may contain practically the same inhabitants, they are legally quite independent of county, township, village, or city authorities in dealing with matters falling within their jurisdiction.

Classification

How extensively these special municipal corporations have developed, particularly in recent years, is indicated by the fact that in 1919 not fewer than eighty-three varieties were mentioned in the legislation enacted by thirty-four states.[1] For convenience, all may be classified in five main groups: (1) school districts, (2) public utilities districts, (3) sanitary districts, (4) water-control districts, and (5) miscellaneous.

1. School districts

School districts are probably the oldest and most numerous of these local subdivisions; they are also more widely distributed over the country, and they appear in a larger variety of forms, than any other class unless it be the fifth named. No less than seventeen different species have been discovered and catalogued, five or six not infrequently being found in the same state.[2] A school district is the unit of local government with which the great majority of native Americans first come into conscious personal contact, and no organ of local government possesses greater potentialities for the training of intelligent and useful citizens. By whatever name they may be called, all such districts exist for essentially the same purposes: to provide the necessary land, buildings, and teachers, and to levy and appropriate the necessary taxes, for the maintenance of elementary, secondary, and high schools. Each district has its school board, school committee, or board of education, usually elected by popular vote in smaller communities, but usually appointed in places of considerable size. This board commonly selects a clerk or secretary, a treasurer, and, in the larger places, a school superintendent.

2. Public utilities districts

Public utilities districts have been created in considerable variety for the sole, or chief, purpose, as the name indicates, of constructing, owning, and operating works necessary to provide the inhabitants of the district with water, gas, electricity, or transportation. They require no special comment.

3. Sanitary districts

Sanitary districts, under various names, have for their main object the improvement and protection of the public health by providing for the establishment of boards of health and the creation and maintenance of drainage and sewerage systems. The best-

[1] *Amer. Polit. Sci. Rev.*, XIV, 286-291 (May, 1920).
[2] *Ibid.*, 290, note 24.

known example is the Sanitary District of Chicago, established in 1889, which comprises, in addition to the entire urban territory, one hundred ninety-five square miles outside of the city, and ninety-seven per cent of the population of Cook county. At a cost of about one hundred million dollars, the trustees of this district have constructed, and now operate, a canal system connecting the Chicago and Illinois rivers, together with the necessary engineering works for reversing the current of the Chicago River. As a result, the sewage of Chicago is no longer turned into Lake Michigan, but is diverted into the Illinois and Mississippi rivers.

4. Water-control districts

Water-control districts have to do primarily with impounding or distributing water supplies, diverting water courses, draining swamps, or protecting given areas against floods or tidal waves. Perhaps the most common illustrations are the irrigation, drainage, or reclamation districts which have been established in about a dozen states. Seven hundred reclamation districts are found in California alone, and an even greater number of drainage districts in Illinois.

5. Miscellaneous districts

In the miscellaneous class one finds a heterogeneous, not to say motley, array of local-government districts: road, paving, and bridge districts, in a dozen states; fire and forest-fire districts in New England, New York, and California; forest-preserve districts; local improvement districts or associations, almost without number; and a large assortment of park districts. Chicago, for example, has no fewer than seventeen park districts, each with its own governing body and all but one with power to levy and appropriate taxes for park purposes.[1]

Corporate powers

In the methods by which these special districts are created, in their form of government, and in the powers which they enjoy, there is, the country over, the greatest diversity. All, however, are endowed with some of the attributes of a municipal corporation, including the right to acquire, hold, and dispose of property, to sue and be sued in the courts, to have a corporate seal, to pass

[1] There are numerous other political subdivisions in every state which are not described in this portion of the book; for example, congressional districts for the election of representatives in Congress; assembly and senatorial districts for the election of members of the state legislature; judicial districts for the choice of judges of the circuit, district, superior, supreme, or other state courts; and probate districts in New England for the election of judges of the probate courts. These districts usually embrace more than one county, although the most populous counties are frequently divided into two or more districts. As these divisions exist solely for electoral or judicial purposes and have no governmental organization or corporate powers, description of them is unnecessary in the present connection.

CHAP. L

regulations called by-laws, and, most important of all, to levy taxes, issue bonds, and take such other steps as may be authorized by law for the accomplishment of the special objects for which the district has been created. These corporate powers are generally exercised through a small governing body of commissioners, directors, or trustees, who are either elected by popular vote, or, less frequently, appointed by some of the state or county authorities. Almost invariably, they serve for short terms and without compensation.

Undesirable results

In many—perhaps most—instances these special municipal corporations have served useful purposes and have justified their establishment. Nevertheless, their multiplication has yielded at least two unfortunate results: it has given rise in some states to a most bewildering system of local government; and it has burdened the voters, in those states particularly, but everywhere in some degree, with an excessively long ballot. To Illinois belongs the rather dubious distinction of having perhaps the most intricate system of local government of any state in the Union. Besides 102 counties and over 70 cities of more than 5,000 inhabitants, there are more than 1,400 townships, about 800 villages, more than 12,000 school districts of one kind or another, and 800 drainage districts, besides sanitary districts, incorporated towns, and park and road districts, whose number is large but not exactly known. The nadir has been reached in the local government system of Cook county, which constitutes a veritable jungle: in the city of Chicago there are no less than thirty-eight distinct local-government units, most of them independent one of another; while outside of the city, in the area of the sanitary district, there are 162 other local governments; and beyond the sanitary district there are 192 additional local governments—making a grand total in Cook county of 392 separate units of government. Naturally one finds a bewildering maze of elective officials. There are 417 elective officers in Chicago, 1,640 in the sanitary district, and 2,557 in the entire county. Every voter in Chicago is expected to vote for at least 178 different officials in a period of about nine years; while in other parts of the county a voter is supposed to have a voice in filling from 172 to 197 different positions in the same stretch of time.[1]

Excessive complexity of local government

[1] See *Ill. Const. Conv. Bull.*, No. 11 (1920), "Local Governments in Chicago and Cook County," 911; *ibid.*, No. 12, "County and Local Government in Illinois," 1036. Election expenses for national, state, and local offices cost the taxpayers of Cook county in 1920 over $2,200,000. See Chicago Bureau of Public Efficiency, *Growing Cost of Elections in Chicago and Cook County*

Superficially, all this appears like democratic government exalted to the nth power. But if the tests of true democratic government were applied to such situations, plenty of instances could be found of little oligarchies masquerading in the trappings of democracy, and of the cloven hoof of autocracy protruding from beneath the cloak of democratic forms. Simplification and unification, to a far greater degree than commonly prevails, are the outstanding needs of both our state and local governments; indeed, they are indispensable prerequisites to the effective functioning of these governments as instruments of a real democracy. Verily, verily, true democratic government consisteth not in a multitude of elective officers, but, rather, in the discriminating popular choice of a few who are continuously sensible of their responsibility to an electorate at once informed, intelligent, and alert.

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APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons,[1] including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The

[1] Altered by Fourteenth Amendment.
[2] Rescinded by Fourteenth Amendment.

number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.[1]

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.[2]

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[3]

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of the President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation.

[1] Temporary provision.
[2] Modified by Seventeenth Amendment.
[3] Modified by Seventeenth Amendment.

When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V

Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the

Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representa-

tives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession

of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.[1]

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

[1] Temporary provision.

SECTION X

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall,

in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.[1]

The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

[1] Superseded by Twelfth Amendment.

Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

SECTION II

The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State;[1] between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

[1] Restricted by Eleventh Amendment.

SECTION III

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.[1]

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.[2]

SECTION III

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

[1] Extended by Fourteenth Amendment.

[2] Superseded by Thirteenth Amendment in so far as pertaining to slaves.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article;[1] and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.[2]

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[1] Temporary clause.
[2] Extended by Fourteenth Amendment.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.[1]

[1] The signatures are here omitted.

AMENDMENTS

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X[1]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

ARTICLE XI[2]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[3]

The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and

[1] The first ten amendments seem to have been in force from November 3, 1791.

[2] Proclaimed in force January 8, 1798.

[3] Proclaimed September 25, 1804.

they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII [1]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

[1] Proclaimed December 18, 1865.

ARTICLE XIV[1]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United

[1] Proclaimed July 28, 1868.

States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[2]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[3]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII[4]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors

[1] Proclaimed March 30, 1870.
[2] Proclaimed February 25, 1913.
[3] Proclaimed May 31, 1913.
[4] Proclaimed January 29, 1919.

within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX[1]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

[1] Proclaimed August 26, 1920.

INDEX

Absent-voting laws, 699
Addystone Pipe and Steel Co. *v.* U. S., 451
Administration, general nature, 64; problems, 64-65; control by president, 260-261; under the national executive departments, 312-329; control of Congress over, 396-398; growth in the states, 639-640; defects, 641-648; removals in, 643; reform of, 648-652; control of in cities, 757-758, 761-764
Administrative consolidation (state), 648-652
Administrative supervision of cities, 752-754
Advisory opinions, 115n, 674
Agriculture, federal Department of, 327-328
Alabama Midland Railway Co. *v.* Interstate Commerce Commission, 448
Alaska, government of, 447-478
Albany Congress, 104-105
Albany Plan of Union, 104
Alexander Murray *v.* Schooner Charming Betsy, 184
Aliens, status in U. S., 180-181; naturalization of, 185-188
Allegiance, an obligation of citizenship, 79
Amending process, in national government, 209-211, 215-216; in states, 560-571
Amendment of statutes, 597
American government, study of, 83-84
Annapolis convention, 126-127
Anti-Masonic party, 524-525
Anti-Trust Act (Sherman), 450
Appointment, power exercised by president, 256-259; by governor, 633-635; by mayor, 755-756, 762-763
Appropriations, by Congress, 420-422; movement for budget system, 422; new machinery in House of Representatives, 423-424; by states, 663-664
Arizona, admission of, 165
Articles of Confederation, adoption, 117-118; main features, 118-120; defects, 120-122; attempts to amend, 122-123, 125
Assessment of taxes, 659-660
"Association" of 1774, 106-107
Attorney-General, federal, 321-322
Autocracy, as a form of government, 43; compared with popular government, 45-46; advantages only formal, 46

Ballin *v.* Nebraska, 166
Ballot, form of, 705-706
Baltimore county, 737n
Bankruptcy, legislation on, 458-459
Banks, in early history of the United States, 425-426; question of constitutionality, 426; system established during Civil War, 426-427
Bauer and Co., *v.* O'Donnell, 462
Bicameral system, general features, 61; in state legislatures, 551, 574-578; in city councils, 758-759
Bill of Rights, in national constitution, 191-192, 211-212; in state constitutions, 559-560
Bills of attainder, 193
Bi-partisan boards, 642
Blake *v.* McClung, 176
Board of Aldermen (N. Y.), 758n
Board of Trade, 88
Boards and commissions, growth of, 639-640
Bond issues in states, 669
British colonial policy, 88, 99-100
Brown *v.* Maryland, 172, 437
Brown *v.* Walker, 272
Brushaber *v.* Union Pacific Railway Co., 408
Bryce, Lord, on nature, English constitution, 37; classification of constitutions, 40
Bryce, J., quoted, 141n, 147, 152, 159, 241-242
Bucks Stove and Range Co. *v.* Gompers, 454
Budget and Accounting Act, 422-424
Budget procedure, in cities, 797-798; in states, 648, 665-667; ancillary reforms, 668; in cities, 756-757
Budget system adopted by Congress, 422-424
Bureau of Corporations, 451
Bureau of Efficiency, 306
Bureau of Insular Affairs, functions, 320
Burke, Edmund, quoted, 93

Cabinet, origins, 296-297; relations with president, 297-298; meetings, 298
Cabinet system, compared with presidential form, 63
Cabinet, vice-president admitted to, 229
Calder *v.* Bull, 193
Calendars, in national House of Representatives, 382-383
California, county home-rule, 733
Campaign funds, 698
Cannon, J. G., deprived of power as speaker, 364-365
Canvassing officers, 703-704
Caucus, as means of nominating presidential candidates, 235-236; workings in national House of Representatives, 365-366; functions, 367-368
Centralized purchasing, 647-648
Challengers, 703
Charter systems, special charters, 746; general charters, 747-748; classification, 748-750; home-rule, 750-751; optional, 751
Charters, of cities, 744-745
Checks and balances, 553
Chicago, taxable personal property, 657
Chinese exclusion cases, 440
Chirac *v.* Chirac, 186
Circuit courts, state, 673-674
Circuit courts of appeals, federal, 502
Cities, growth of, 743; relation to state government, 744; legal status, 744-745; legislation interference, 745-746; state supervision of, 752-754; mayor-council form of government, 755-764; commission form, 765-773; manager form, 773-776; police department, 777-781; fire department, 781-783; health and sanitary department, 783-786; water supply, 788-789; waste collection and disposal, 789-791; streets, 791-792; social welfare activities, 792-793; education, 793-795; sources of income, 796; indebtedness, 797; budgetary methods, 797-798; accounts, 798
Citizenship, rights, 77-78; obligations, 79-80; by birth, 183-185; by naturalization, 185-189; defined, 182; early opinions, 181-182; interstate, 176, 190; national and state, 182-183; privileges of, 196-197; rights pertaining to, 189-190; status of territories and dependencies, 185-186; protection abroad, 264
Civil service, extent in United States, 290-291; rise of spoils system, 299; early reforms, 300; Pendleton Act, 300; merit system extended, 301; Civil Service Commission, 301-302; examinations, 302; comparison with English system, 302-303; method of appointment, 303-304; security of tenure, 304; restraint on political activity, 304-305; promotions, 306; question of extending merit system, 306-308; compensation, 308-309; retirement allowances, 309-310; reform in the states, 643-645; in cities, 763
Civil Service Commission, national, 301-302; state, 644-645
Clerk, of national House of Representatives, 358
Closed primary, 693
Closure, in national House of Representatives, 372, 385-386; in Senate, 374-375, 389
Cohens *v.* Virginia, 400
Colonial governments, beginnings, 83; charters, 87-88; collapse of, 111; democracy in, 96-98; uniformity, 87-88; variations, 86-87; governor, 89-91; legislature, 91-92; suffrage, 92-93; judiciary, 94-95; local government, 95-96
Colonial political ideas, 96-98
Colorado, civil service, 644n
Commerce, federal department of, 328-329
Commerce, under Articles of Confederation, 123-124; regulatory power given to Congress, 170-172, 434; restrictions on this power, 434-435; meaning of, 435-436; modes of regulating with foreign nations, 437-440; regulating among the states, 441-444; Interstate Commerce Act, 444-447; work of Interstate Commerce Commission, 447-450; anti-trust legislation, 450-452; Federal Trade Commission, 452-453; relation of state and national control, 454-455
Commission government, in cities, development, 766-767; essential and incidental features, 767-771; defects, 771-772; merits, 772-773
Commission-manager government, in cities, spread, 773; selection of managers, 774; manager's functions, 774-775; results, 776
Committee of selection, in national House of Representatives, 370
Committee of the whole, in national House of Representatives, 384-385
Committee on appropriations, in national House of Representatives, 420-422

Committee on rules, dominance in House of Representatives, 372-373
Committee on ways and means, in national House of Representatives, 416
Committees, formerly appointed by speaker in House of Representatives, 364; control by caucus, 367-368; number and size, 369; appointment, 369-370; seniority rule, 371; dominance of committee on rules, 372-373; steering committee, 373; in Senate, 375-376; hearings and procedure, 380-382; privileges, 383-384; committee of whole, 384-385; consideration of tariff measures, 416-417; in state legislatures, 608-613; reorganization of, 610-611; defects in, 612-613; in Ohio, 611-612; references on, 613n
Concurrent powers, 151
Conference committees, in Congress, 389-391, 612n
Congress, war powers, 269-270; convened in special session by president, 274; messages from the president, 274-276; presidential veto, 276-281; other means of presidential influence, 281-282; control over the president, 284; need of presidential leadership, 285-286; proposed admission of heads of departments, 286-287; requests upon departments for information, 296; possessor of sole national legislative authority, 334; why bicameral, 335; election of House of Representatives, 336-341; regulation of election of members, 341; term of congressmen, 342; qualifications, 343-345; federal basis of Senate, 345-346; proposed change, 346-347; direct popular election adopted, 349-352; term and continuity of Senate, 352; qualifications of senators, 353; compensation and privileges of members, 353-354; sessions, 356-357; organization of House, 357-359; rules, 359-361; the Speaker and his powers, 361-365; power of caucus, 365-368; number and size of committees, 369-370; appointment of committees, 370; dominance of committee on rules, 372-373; organization of Senate, 373-374; closure in Senate, 374-375; Senate committees and rules, 376-377; physical environment, 378-379; introduction of bills, 379-380; committee procedure, 380-382; the calendars, 382-383; House procedure, 383-387; Senate procedure, 387-389; conference committees, 389-391; publicity of proceedings, 391-392; impeachment procedure, 392-394; miscellaneous functions, 395-398; nature of legislative power, 398; express and implied powers, 399-400; resulting powers, 400-401; police powers, 401; permissive and mandatory powers, 401-402; exclusive and concurrent powers, 402-403; specific constitutional limitations, 403-404; limitations on taxing power, 406-409; revenue legislation, 415-418; appropriations, 420-421; budget system adopted, 422-424; establishment of banking system, 425-429; regulation of the currency, 429-432; power to regulate commerce, 434-436; modes of regulating foreign commerce, 437-440; regulation of interstate commerce, 441-444; passes Interstate Commerce Act, 444-447; anti-trust legislation, 450-454; regulation of bankruptcy, 458-459; regulation of weights and measures, 459-460; control of copyrights, 460-461; control of patents, 460-461; control of postal affairs, 463-465; war powers, 465-466; war-time legislation, 467-468; suspension of writ of habeas corpus, 468-469; regulation of militia, 469; power to acquire territory, 473-474; power to govern territory, 474-477; control over District of Columbia, 489; possible control over judiciary, 513-514; references on, 354-355, 377, 394, 404, 432-433, 456-457
Congress of the Confederation, 119-121
Congressional procedure, 220-221
Congressional Record, 392
Connecticut compromise, 135
Constitution, varying uses of term, 35-36; in England, 36-37; development in written form, 37; never wholly in written form, 38; distinguished from statutes, 39; contents, 39; modes of growth, 40-42; enumeration of rights, 76
Constitution (state), length, 556-558; contents, 559-560; amendment, 560-570; future of, 570-571
Constitution (U. S.), character of, 140-141; compromises in, 131-132, 135-136; drafting of, 129, 137; objections to, 138; ratification, 139-140; put into effect, 140; sources, 142
Constitutional conventions (state), 565-570; calling, 565-567; size, 567;

organization, 567-568; powers, 568-569; submission of work, 569-570
Consular service, 315-316
Continental Congress, inadequancy of, 116-118
Contractual ordinances, 759
Convention, nominating, introduced in nominating presidential candidates, 236; arrangements for, 237; composition, 237-241; physical surroundings, 241-242; temporary organization, 242; committees, 242-243; platform, 243-244; nomination of candidates, 244; "unit rule," 244; "two-thirds" rule, 245; balloting, 245
Cooley, T. M., quoted, 194
Cooley *v.* Wardens of the Port, 172, 455
Copyright, controlled by Congress, 460-461
Coroner, 729-730, 736
Corporate charters, as contracts, 174
Corporate excess, 655
Corrupt practices laws, 697-698
Council (city), decline of, 757-758; structure, 758-759; bicameral, 759; ordinances, 759-760; in New York, 758n
Council, governor's, 91, 636n
County, origins, 716-717; general features, 717-718; functions, 718-719; legal status, 719; county board, 722-726; sheriff, 726-727; prosecuting attorney, 727-729; coroner, 729-730; clerk, 730; other officers, 730; unsatisfactory condition of government, 732-733; remedies, 733-737; relations to city, 737; surveys, 739-740; means of reform, 740-741; references on, 731, 741-742
Court clerk, 730, 736-737
Court of Claims, 512
Courts. *See* Judiciary
Criminal procedure, in federal courts, 497-498
Cummings *v.* Missouri, 193
Currency, chaotic condition before 1789, 430; regulated by Congress, 173, 430-432
Customs Appeals, court of, 512
Czechoslovakia, recognized, 9

Dartmouth College *v.* Woodward, 174, 194
Declaration of Independence, 108, 110, 111, 117-118
Declaratory judgment, 684
Delaware survey, 740
De Lima *v.* Bidwell, 408
Democracy, advantages and disadvantages, 47-48; in colonies, 97
Democratic party, machinery for nominating president, 237-238; origins, 524; rehabilitation, 530; issues, 531-533, 535
Departments, federal, general features, 291-294; how heads are selected, 292-294; functions of heads, 294-296; described, 312-330; movement for reorganization, 330-332
Diplomatic service, 314-315
Direct legislation, 600-605; states having, 600n; in Massachusetts, 601n, 602, 603, 604n, 605n; arguments for, 604; objections to, 604-605; references on, 606-607
Direct primary, 693-694
Disputed Presidential Election Act (1887), 249
District courts, federal, 501-502
District of Columbia, government of, 489
Districts, kinds and functions, 805-808
Dooley *v.* U. S., 408
Dorr rebellion, 162
Double election boards, 704
Downes *v.* Bidwell, 408
"Due process," 194-196, 685-686

Economics, relation to political science, 6-7
Education, administration in cities, 793-795
Educational qualifications, 203-204
Eighteenth Amendment, 211n, 213-214
Election, of president and vice-president, 232-252; of congressmen, 336-341; of senators, 348-352; of members of state legislature, 574; of governor, 624-625; laws, 701; officers, 701-705; system criticized, 706-709
Electoral college, 220, 246-248
Electorate, relation to government and people, 68-70; composition, 70-71; questions pertaining to, 71; in colonial period, 93; in early states, 113; women admitted to, 200-203; qualifications of, 203-207; general features today, 698-699
Electrical voting, 597n
Eleventh amendment, 212
Elk *v.* Wilkins, 184
Embargoes, laid by Congress, 437
Emergency acts, 601n
Emergency Fleet Corporation, 439
Eminent domain, 192-193
England, nature of constitution, 36-37, 39; rise of representative government, 48; basis of individual rights, 76-77; civil service, 302-303
Equalization of assessments, 660
Escanaba Co., *v.* Chicago, 166, 455

Executive, as a branch of government, 61-62; single and plural, 62; hereditary and elective, 62; modes of election, 63; problem of in 1787, 226; decision reached, 226-227 (*see* President, Governor, Mayor)
Executive agreement, nature and effects, 267-268
Executive budget, 665-666
Executive council, in states, 636n
Exporter Combination Law (Webb), 454
Ex post facto laws, 193-194
Extradition, interstate, 177-178

Family, as possible origin of the state, 18-19
Farm Loan Board, 429-430
Farmer-Labor party, 537-538
Federal convention (1787), called, 127; compromises in, 131-132, 135-136; organization and procedure, 130-131; personnel, 129-130; problems before, 131-134; report to Congress, 137-138
Federal government, nature, 53; advantages, 53-54; defects, 54-55; tendencies away from, 56
Federal guarantees, 191-192
Federal reserve banks, 428-429
Federal Reserve Board, 429-430
Federal Trade Commission, 452-453
Federalist, 124n, 137n, 139-140, 162n
Federalist party, 519-522
Fifteenth Amendment, 198, 204, 206, 212
Filibustering, in Senate, 388-389
Finance (municipal), sources of income, 796; indebtedness, 797; budgetary methods, 797-798; accounts, 798-799
Finance (national), part of Treasury Department in, 316-319; restrictions on taxing power, 406-409; scope of taxing power, 409; motives of taxation, 409-410; national revenues, 410-413; collection of revenue, 413-414; revenue, legislation, 415-418; expenditures, 419-420; appropriations, 421-422; budget system adopted, 422-424; borrowing money, 424-425; national banking system, 425-427; federal reserve system, 428-429; federal land banks, 429-430; currency system, 430-432
Finance (state), sources of revenue, 654-655; general property tax, 655-659; assessment, 659-662; collection of taxes, 662; custody of funds, 662-663; appropriations, 663-665; budget systems, 665-668; indebtedness, 668-669
Fire department, in cities, 781-783
First Continental Congress, 105-106
Fourteenth Amendment, 182, 190, 194, 207, 212
France, constitution, 38
Franklin, B., 103, 104
Free Soil party, 527-528
"Full faith and credit" clause, 175-176

Garner, J. W., views on functions of the state, 29-30
General property tax, features of, 655-657; substitutes for, 658-659
Gerrymander, of congressional districts, 340-341; of legislative districts, 582-583
Gibbons *v.* Ogden, 172
Gonzales *v.* Williams, 186
Government, reasons for studying, 4-5; distinguished from state, 14; form regulated by constitution, 35; classifications, 43-44; autocratic, 43; oligarchic, 44; popular, 44-45; disadvantages of democracy, 47; representative principle, 48; advantages of representative plan, 49; territorial distribution of powers, 51-52; federal, 53-56; functional distribution of powers, 56-58; structure influenced by distribution of powers, 59; presidential and cabinet forms, 63; rights as against, 75
Governor, early position, 113-114; election, 624-625; qualifications, 625; term, 625; salary, 625; removal, 625-626; successor, 626; veto power, 626-630; messages, 631-632; leadership, 631-632; appointing powers, 633-635; budget-making, 631; power of direction and removal, 635-636; miscellaneous powers, 636
Governor's council, colonial, 91; state, 636n
Grandfather clauses, 205-206
Grant, U. S., seeks third term, 227
Greenback movement, 532
Guam, government of, 488
Guinn *v.* U. S., 206

Habeas Corpus, suspension of writ of, 468-469
Habeas Corpus Act, 97
Hagar *v.* Reclamation District, 195
Hamilton, A., favored life tenure for president, 227
Hammer *v.* Dagenhart, 409, 508

Harding, W. G., invites vice-president into cabinet, 229; advocates administrative reorganization, 331-332
Hare system, 585-586
Harrington, J., 96
Hawaii, government of, 478-480
Hayes, R. B., elected president in 1876, 249
Health departments, in cities, 783-785; in New York, 785-786
Henry *v.* A. B. Dick Co., 462
Hepburn *v.* Griswold, 431
History, relation to political science, 7
Hollingsworth *v.* Vermont, 210
Home-rule, in counties, 733; in cities, 750-751
Hooker, R., 96
House of Representatives; *see* Congress and Representatives, House of
Hylton *v.* U. S., 406

Illinois, assessment of taxes, 659; legislature, 610, 612, 616; state administration, 645-646; civil administrative code, 650-651; appropriation bills, 664n
Illinois Cities and Villages Act, 747-748
Illinois Committee on Efficiency and Economy, *Report*, 644n
Illinois tax amendment, 564
Immigration, regulation by Congress, 440-441; administration, 441
Impeachment, 114, 392-394, 625, 683, 709
Implied powers, 153-154
Income tax, declared unconstitutional by Supreme Court, 213, 407; authorized by Sixteenth Amendment, 213, 408
Indebtedness (state), 594
Indiana legislature, 598-599
Indictments, 677
Informations., 677-678
Initiative, for constitutional amendments, 560-563; for statutes, 600-605
In Re Neagle, 513
Insular decisions, 476
Interior, federal Department of, 324-327
Intermediate courts, 675
International law, rise, 32; nature, 33-34
Interstate citizenship, 176, 190
Interstate commerce. *See* Commerce
Interstate Commerce Act, 444-447
Interstate Commerce Commission, 447-450
Interstate Commerce Commission *v.* Cincinnati, etc., Railway Co., 448
"Invisible government," 647
Iowa county superintendent of schools, 737n
Iowa legislature (1921), 567n

Jay, J., 139
Jefferson, T., 25, 110, 111, 129n, 153, 233-234, 275
Jeffersonian Republican party, development, 518-521; supremacy, 522-523
Judge-made law, 217-219
Judges (state), removal, 682-684; retirement, 683n; selection, 679-682; term, 673, 674
Judicial interpretation, 217-219
Judicial review, 115, 156-157, 158, 557-558, 679, 684-686, 687n
Judiciary, general nature, 66-67; kinds of courts, 67; independence, 67-68
Judiciary (national), reasons for creation, 491-493; scope of power, 493-494; jurisdiction on ground of subject-matter, 494; and on ground of nature of the parties, 495; exclusive and concurrent jurisdiction, 495-496; how cases are brought, 496-497; criminal jurisdiction, 497-498; civil jurisdiction, 498-499; equity cases, 499; admiralty cases, 499; district courts, 501-502; circuit courts of appeals, 502; composition and character of Supreme Court, 502-504; procedure, 504-505; review of legislation, 505-509; relation to other branches of government, 513-515
Judiciary (state), removal of cases to federal courts, 496; appeal to federal courts, 496-497; court officials, 676; court procedure, 679; defects of court organization, 678-679; court reports, 675n; court officials, 676; defects, 678-680; proposed changes, 681-686
Juillard *v.* Greenman, 431
Jury system, 676-678
Jus sanguinis, 183-184
Jus soli, 184-185
Justice, federal Department of, 321-323
Justices of the peace, 671-672

Kentucky *v.* Dennison, 178
Knownothing party, 526-527
Knox *v.* Lee, 431

Labor, federal Department of, 328-330
Lands, public, 326
Lapp, J. A., quoted, 598-599

League of Nations, organization, 33-34
Lee, R. H., 117
Legislation (state), subjects of, 618, 619-620; executive and, 620-621
Legislative caucus, 692
Legislative districts, 581-583
Legislative ordinances, 759-760
Legislative reference libraries, 618-619
Legislative removal, 683
Legislature, functions in general, 60; questions of structure, 60-61; in colonial period, 91-94; in states in Revolutionary period, 114; bicameral form in present states, 574-577; movement for unicameral form, 578-579; composition, 579-588; powers, 589-592; non-legislative functions, 590n; restrictions, 592-595; procedure, 596-597, 609n, 613-616; sessions, 597-599, 630; check by initiative and referendum, 599-606; officers, 608; committees, 608-613; personnel, 580-581, 616-617; bill-drafting, 617-618; sources of information, 618-619; the lobby, 621-622
Leisy *v.* Hardin, 172
Liberty, necessary restraints on, 73
Liberty party, 527-528
Lieutenant-governor, 626, 636
Lincoln, A., use of war power, 270-271
List system, 586-587
Lobby, 621-622
Local government, 95-96, 554, 715ff
Locke, J., 96
Loewe *v.* Lawlor, 454
Long ballot, 707
Louisiana, parishes, 733n
Luther *v.* Borden, 162

McCray *v.* U. S., 171
McCulloch *v.* Maryland, 154, 168-169
McKane *v.* Durston, 195
McPherson *v.* Blocker, 247
"Machines" and state administration, 647
Madison, J., 125, 131, 140, 147
Manager, in cities, 773-776
Marbury *v.* Madison, 157, 400, 505
Marshall, J., quoted, 154, 169
Martin *v.* Mott, 469
Maryland, budget system, 594, 666; county home-rule, 733
Massachusetts, initiative in, 601n, 604n, 605n; referendum in, 601n, 605n; legislature, 615-616
Mayor, salary and term, 755; powers and duties, 755-757; in Boston, 756; in New York, 757
Mayor-council government, 755ff
Merit system, in national administration, 299-310; in the states, 643-645
Michigan, chooses presidential electors by districts, 247; administration, 646n; constitution, 596; county boards, 735
Miller *v.* Mayor of New York, 296
Minnesota legislature, 688n, 690
Minor *v.* Happersett, 163, 198
Missouri Pacific Railway Co., *v.* Kansas, 280
Mixed caucus, 692
"Model State Constitution," 576n, 621n, 631-632n
Morris, G., 137
Motion Pictures Patent Co., *v.* Universal Film Co., 463
Munn *v.* Illinois, 456

Nassau county (N. Y.), 733n
Nation, distinguished from state, 14-15; tendency to national statehood, 15-16
National Guard, control by Congress, 469
National Republican party, 523-524
Naturalization, collective, 185-186; individual, 186; early abuses, 186-187; present system, 187-188; persons ineligible, 189
Navy, federal department of, 320-321
Nebraska, impeachment in, 683n; legislature, 609, 617n
Negro suffrage, 200, 204-206, 700n
New England, town government in, 800-801
New England Confederation, 104
New Jersey, civil service pension, 645n
New Jersey plan, 132
New York and New Jersey agreement, 167n
New York City, board of estimate and control, 665n; health department, 785-786
New York committee on reconstruction, report, 648n, 652, 665n
New York (state), administration, 642, 646n; appropriation bills, 664n; legislature, 575-576, 615
Nineteenth amendment, 198, 201, 214
Nomination, of president, 235-245; in states, 692-694
Non-partisan ballot, 688n, 690-691
Northwest Ordinance, 165, 472-473

Obedience, an obligation of citizenship, 79-80
Obligation of contracts, 173-174
Ohio legislature (1919), 577, 581n, 611-612, 668n

Oklahoma, Constitution of, 593
Oligarchy, as a form of government, 44
Open primary, 693
Optional charters, in counties, 733; in cities, 751
Ordinances, made by president, 261-262; in cities, 759-760
Original package doctrine, 172

Pacific Insurance Co. *v.* Soule, 406
Pacific States Tel. and Tel. Co. *v.* Oregon, 163
Panama Canal Zone, government of, 488
Parcel post, 464-465
Pardon, power wielded by president, 272-273
Parties, political, uses, 517; two-party system, 518; periods in history, 519; Federalists, 519-521; Jeffersonian Republicans, 519-523; National Republicans, 523-524; Whigs, 524-526; Democrats, 524, 530-535; Anti-Masons, 524-525; Knownothings, 526-527; Republicans, 528-535; Free Soilers, 527-528; Prohibitionists, 532-533; Progressives, 533-534; Populists, 536-537; Socialists, 537; Farmer-Labor, 537-538; platforms, 538; organization, 538-541; finance, 541-543; activity in the states, 689; nonpartisan elections, 690-691; nominating methods, 692-694; state and local committees, 694-696; activities in the states, 696-712
Patents, administration, 325-326; controlled by Congress, 461-462; price-fixing under, 462-463
Pendleton Act, 300-301
Pennsylvania legislature, 611, 615n
Pensions, for federal employees, 309-310; in New Jersey, 645n
Personal property tax, 656-658
Philippines, early military government, 483; civil government, 483-484; organic law of 1916, 484-485; the legislature, 485-486; the executive, 486; the judiciary, 486-487; question of independence, 487
Platform, framed in national convention, 243, 538
Plurality elections, 709
Pocket veto, of president, 277; of governor, 627
Police department, in cities, 777-781
Police magistrates, 673
Police power, 195-196
Political "machines," 696
Political science, relation to other social sciences, 6-7
Polling officials, 702-704
Pollock *v.* Farmers' Loan and Trust Co., 213, 407
Population, necessary element of a state, 9
Populist party, 536-537
Porto Rico, government of, 480-483
Postal savings-banks, 464
Postmaster-General, 323-324
Post-office, federal Department of, 323-324; functions, 463-464; air mail service, 465
Preferential ballot, 709
President, term, 227; re-eligibility, 227; proposed six-year term, 228; qualifications, 230; salary and allowances, 230-231; immunities, 231; original mode of election, 232-233; contested election of 1800, 233-234; Twelfth Amendment, 234-235; early modes of nomination, 235-236; nomination in national conventions, 237-245; electoral campaigns, 245-246; choice of electors, 246-247; election by minority, 247; electoral count, 248-251; proposed electoral changes, 251-253; sources of executive power, 254-255; magnitude of power, 255-256; power of appointment and its restrictions, 256-259; power of removal, 259-260; power of direction, 260-261; ordinance power, 261-262; control over foreign relations, 262-268; war powers, 268-272; powers of pardon and reprieve, 272-273; convening Congress in special session, 274; messages, 274-276; veto power, 276-281; other means of controlling legislation, 281-282; party leadership, 282-284; steady growth of power, 284-285; selection of heads of departments, 292-294; relations with cabinet, 296-298; references in, 231, 253, 273, 290
Preventive justice, 679, 684
Primary, in nominating presidential candidates, 240-241; in state and local elections, 693-694
Privileges of citizenship, 197ff
Probate courts, 673-674
Progressive party, 533-534
Prohibited powers, national government, 151; states, 151-152
Prohibition party, 532-533
Proportional representation, Hare system, 585-586; list system, 586-587
Prosecuting attorney, 727-729, 736
Publicity pamphlets, 604n, 605n, 697n

Quasi-judicial powers, 671n

Randolph, E., 131, 132
Rasmussen *v.* U. S., 475
Reapportionment, of members of House of Representatives, 338-340
Recall, of the governor, 625-626; of judges, 684; of judicial decisions, 687n; general features, 711; extent of use, 712
Recognition, president's power of, 263
Referendum, of state constitutions, 562-571; of laws, 600-602; in Massachusetts, 603; advantages and disadvantages, 604-606; references on, 606-607; in Massachusetts, 601n, 605n; in Missouri, 605n; references on, 606
Registration of voters, 699-701
Regulations, administrative, 760
Religious freedom, 191
Removal, power exercised by president, 259-260; limits in the merit system, 304; power exercised by governor, 625-626, 710-711; by mayor, 756
Representation, rise as a principle of government, 48; advantages over direct government, 49; British and colonial ideas of, 101-102
Representatives, House of, by whom elected, 336; apportionment of members, 337; increased size, 337; general-ticket and district elections, 339-340; term, 342-343; qualifications of members, 343-345; compensation, 353; privileges, 354; organization, 357-358; officers, 358-359; rules, 359-361; the Speaker, 361-365; party discipline, 365-366; workings of caucus, 367-368; number and size of committees, 369-370; appointment of committees, 370; seniority rule in committees, 371; dominance of committee on rules, 372-373; steering committee, 373; mode of introducing bills, 379-380; committee procedure, 380-382; calendars, 382-383; order of business, 383-384; committee of the whole, 384-385; closure, 372, 385-386; methods of voting, 386-387; conference committees, 389-391; publicity of proceedings, 391-392; part in impeachment, 392-394
Republican Party, machinery for nominating president, 237-239; origins, 528-529; rebirth, 529-530; issues, 531-533, 535
Reserved powers of states, 150-151
Responsibility, official, 710-712
Revenue, national government, 405-414; in the states, 653-662; in cities, 795-797
Revolution, causes of, 99-102; union of colonies during, 105-107; growth of democratic opinion during, 108-110; state governments formed, 111-114
Reynolds *v.* U. S., 191
Rhode Island, constitutional connection in, 565n
Rights, as against state and government, 74-75; how defined and protected, 75-77; kinds, 77-78; distinguished from privileges, 196-197; of citizens, 189
Ripper legislation, 745n
Roosevelt, T., seeks third term, 227; view of president's power, 255; executive agreement with Santo Domingo, 267
Rules, of national House of Representatives, 359-361

Samoa, government of, 488
San Francisco, elections, 703-704
Sanitary districts, 806-807
School districts, 806
School of Magnetic Healing *v.* McAnulty, 295
Scott *v.* Sanford, 182
Second Continental Congress, 107-108
Secretary of state, federal, 313-314
Selectmen, 95
Senate, rôle in treaty-making, 265-267; federal basis, 345-346; proposed change, 346-347; original mode of election, 348; election regulations of 1866, 349; movement for direct popular election, 349-351; popular election and its effects, 351-352; term and continuity, 352; qualifications, 353; compensation, 353-354; privileges, 354; presiding officer, 373-374; caucus, 374; closure, 374-375; 389; committees, 375-376; rules, 377; procedure, 387; obstruction, 388-389; conference committees, 389-391; publicity of proceedings, 391-392; part in impeachment proceedings, 392-394
Senatorial courtesy, 257-258
Separation of powers, 113, 552-553, 621, 763-764
Sergeant-at-arms, of national House of Representatives, 359
Service, an obligation of citizenship, 80
Seventeenth Amendment, adoption and effects, 213, 351-352
Sheriff, 726-727, 736

Shipping Board, 439
Short Ballot, 707-709
Sixteenth Amendment, 213
Slaughter House Cases, 182, 190
Slave trade, 136
Social contract, an explanation of origin of state, 17; objections to the theory, 18
Socialism, theory of state functions, 27-28
Socialist party, 537
Sociology, relation to political science, 6
Southern Pacific Co., *v.* Jensen, 218
Sovereignty, essential attribute of a state, 11; definition, 11-12; question of divisibility, 12-13; divided exercise, 13-14; where lodged in United States, 149
Speaker, of national House of Representatives, powers, 361-362; compared with English Speaker, 362; importance, 362-363; prerogatives, 363-364; losses of power in 1910-11, 364-365; caucus selection, 367
Special legislation, 595-596, 745-746
Spencer, Herbert, views on functions of the state, 25
Spoils system, rise, 299; reform, 300-301
Springer *v.* U. S., 407
Stamp Act Congress, 104
State, varying uses of term, 8; essential elements, 9-11; sovereignty as an attribute, 11-12; absence of legal restraints, 12; distinguished from government, 14; and from nation, 14-15; tendency to develop on national lines, 15-16; theories of origin, 16-19; best view of origins, 19-20; classifications, 20-22; purposes, 23; anarchist view, 23-24; individualist view, 24-26; collectivist view, 26-27; socialistic view, 27-28; objects summarized, 29-30; classes of functions, 30-31; interrelations, 31-32; rise of international law, 32-33; leagues and unions, 33-34; no rights as against, 74
State, federal department of, 312-316
State Central Committee, 694-695
State debts, 668-669
State funds, custody of, 662-663
State police, 641n
State rights, 145-146
States, importance, 159, 545-549; population, 160; equality, 160, 550; admission to Union, 163-165; connection with foreign relations, 167; interstate relations, 167; limitations on, 166-174; common features, 550-554; constitutions of, 555-571; government of, 573ff; State Tonnage Tax Cases, 168
Statutory amplifications of constitution, 216-217
Stearns *v.* Minnesota, 166
Strauss and Strauss *v.* Amer. Publishers Assoc., 462
Streets, construction and upkeep, 791-792
Suffrage, in colonial period, 93; in early states, 113; given to women, 200-203; qualifications for, 203-207; general features today, 698-699
Sugar Act, 100
Superior courts, 675
Supreme Court, structure, 502-504; sessions, 504; decisions and opinions, 504-505; jurisdiction, 505; development of judicial review of legislation, 505-507; procedure in judicial review, 508-510; in states, 674-675

Taft, W. H., view of president's power, 255; and of president as party leader, 283-284; advocates administrative reorganization, 330-331; on administration of criminal law, 678n
Tariff, mode of legislation, 415-417; commission on, 418
Tariff Commission, 418
Tax commissions, 661
Tax rate, 662
Taxation, lack of power under Articles of Confederation, 122; provision in national constitution, 405; purposes for which allowed, 406; apportionment, direct taxes, 406-407; federal income tax, 407-408; uniformity of indirect taxes, 408; motives, 409-410; present forms and yields, 409-413; methods of legislation, 415-418; Tariff Commission, 418; in the states, 654-655; general property tax, 655-662
Tenth Amendment, 222
Tenure of Office Act, 259
Territory, necessary element of a state, 9; dependent, origin of, 471-472; Northwest Ordinance, 472-473; power to acquire, 473-474; power to govern, 474-475; insular decisions, 476; government of Alaska, 477-478; government of Hawaii, 478-480; government of Porto Rico, 480-483; government of the Philippines, 483-487; government of minor dependencies, 487-489
Thirteenth Amendment, 212
Three-fifths clause, 135-136
Tocqueville, A. de, observations on English constitution, 36

Tonnage duties, laid by Congress, 437-438
Town, government of, in New England, 800-801
Township, forms, 802-803; government, 803-804
Treasury, federal Department of, 316-319
Treasury, of United States, 414-415
Treaties, presidential initative, 265; Senate's rôle, 265-266; abrogation, 266-267; relation to executive agreements, 267-268
Twelfth Amendment, adopted in 1804, 212, 234-235
Twining *v.* New Jersey, 194, 195

Unicameral legislatures, in Canada, 577; movement for, 578-579
Unit rule, in Democratic national convention, 244-245
United States *v.* Anthony, 198
United States *v.* E. C. Knight Co., 450
United States *v.* Joint Traffic Association, 451
United States *v.* Trans-Missouri Freight Association, 451
University of Wisconsin, 645n

Van Allen *v.* Assessors, 170
Veazie Bank *v.* Fenno, 173, 406
Veto, why given the president, 276; circumstances under which used, 277-278; frequency, 278-279; effectiveness, 279-280; as applied to items of bills, 280-281; threatened use, 281; as exercised by the governor, 114, 626-630
Vice-president, provided for by constitution, 228; admitted to cabinet, 229; succession to presidency, 229-230; nomination, 245; presiding officer in Senate, 373-374
Villages, government of, 804-805
Virgin Islands, government of, 487-488
Virginia, budget system, 666
Virginia *v.* Tennessee, 167
Virginia plan (1787), 131-132, 156

Wabash Railway Co., *v.* Illinois, 445
War, federal Department of, 319-320
War Finance Corporation, 439
War, presidential power during, 268-271; declaration, 466; preparations, 467-468; regulations for, 468
Ward system, 758
Washington, G., in constitutional convention, 130; refuses third term, 227
Waste, collection and disposal in cities, 789-791
Watchers, at polls, 702-703
Water supply, in cities, 788-789
Webster, D., quoted, 146, 194
West *v.* Louisiana, 195
Westchester county (N. Y.), 733n
Whig party, 524-526
Williams *v.* Mississippi, 206
Wilson, J., 134
Wilson, W., opposes limitation of president to one term, 228; advocates nation-wide presidential primary, 241; use of war power, 271; revives oral message to Congress, 275; as a leader in legislation, 286; views on the Senate, 347
Wisconsin, county boards, 723n
Wisconsin *v.* Pelican Insurance Co., 176
Woman suffrage, 163, 200-202

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